SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1964~~ 1965

No. ~~571~~ 9

SWIFT & COMPANY, INC., ET AL., APPELLANTS,

vs.

DON J. WICKHAM, COMMISSIONER OF AGRICULTURE AND MARKETS OF NEW YORK.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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[fol. A] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

63 Civil 3085

Swift & Company, Inc. and Armour and Company,
Plaintiffs,

—against—

Don J. Wickham, Commissioner of Agriculture and Markets of the State of New York, Defendant.

Amended Complaint—Filed November 7, 1963

Plaintiffs, for their amended complaint against defendant, allege:

First: Plaintiff Swift & Company, Inc., hereinafter referred to as Swift, is a corporation duly organized and existing under the laws of the State of Illinois and is qualified to do business in the State of New York.

Second: Plaintiff Armour and Company, hereinafter referred to as Armour, is a corporation duly organized and existing under the laws of the State of Delaware and is qualified to do business in the State of New York.

Third: Defendant is Commissioner of Agriculture and Markets of the State of New York whose duties include the enforcement of the Agriculture and Markets Law of the State of New York and the promulgation and enforcement of rules and regulations pursuant to that law.

Fourth: Under USC, Title 28, Sections 2281, *et seq.*, provision is made for the convening of a three-judge district court where the relief requested is an interlocutory or permanent injunction restraining enforcement, operation or execution of any state statute by restraining the action of any officer of such state in the enforcement or execution of such statute. As appears more fully below, plaintiffs seek such relief and request the convening of such court.

[fol. B] Fifth: This action is brought pursuant to the Federal Declaratory Judgment Act, 28 USC, Sections 2201 and 2202, to protect the rights bestowed on plaintiff under Article I, Section 8, Clause 3, and Article VI, Clause 2, of the United States Constitution, Amendment XIV, Section 1, to the United States Constitution, and by the Poultry Products Inspection Act, 21 USC, Sections 451, *et seq.*, and the regulations issued thereunder as more fully appears below. The amount in controversy, exclusive of interest and costs, exceeds the sum of Ten Thousand and No/100 Dollars ($10,000.00).

Sixth: Plaintiffs are engaged, *inter alia,* in the business of the manufacturing, processing, distributing, offering for sale and selling food products, including poultry and poultry products, throughout the United States. Among the products manufactured, processed, distributed, offered for sale and sold by plaintiffs are frozen stuffed turkeys. Plaintiffs ship in interstate commerce several hundred thousand pounds of said stuffed turkeys throughout the United States from their plants located in Minnesota, Wisconsin and California. Such interstate shipments of frozen stuffed turkeys are an important part and represent a substantial portion of the business of plaintiffs.

Seventh: A frozen stuffed turkey is a poultry product consisting of the eviscerated carcass of a turkey whose visceral cavity has been filled with an edible dressing and which is frozen at the manufacturing plant immediately after stuffing and remains frozen until its sale to the ultimate consumer. The frozen stuffed turkeys produced by plaintiffs in their manufacturing plants in Minnesota, Wisconsin and California are enclosed and sealed in a flexible plastic wrapper prior to freezing. The frozen stuffed turkeys are intended to remain and do remain enclosed in these plastic wrappers until after their sale to the ultimate consumers.

[fol. C] Eighth: The Poultry Products Inspection Act, 21 USC, Sections 451, *et seq.*, prescribes a comprehensive detailed scheme for regulating the processing and distribution of poultry and poultry products in interstate commerce. The following are pertinent provisions of that law:

> "The term 'Secretary' means the Secretary of Agriculture." 21 USC 453(b).
>
> "The term 'immediate container' includes any consumer package . . . ." 21 USC 453(p).
>
> "The Secretary whenever processing operations are being conducted, shall cause to be made by inspectors post mortem inspection of the carcass of each bird processed . . ." 21 USC 455(b).
>
> "Each immediate container of any poultry product inspected under the authority of this chapter and found to be wholesome and not adulterated shall at the time such product leaves the official establishment bear, in addition to the official inspection mark, in distinctly legible form, the name of the product, a statement of ingredients, if fabricated from two or more ingredients including a declaration as to artificial flavors, colors, or preservatives, if any, *the net weight* or other appropriate measure of the content, the name and address of the processor and the approved plant number of the official establishment in which the contents were processed." 21 USC 457(a). (Italics supplied.)
>
> "The following acts or the causing thereof are hereby prohibited:
>
> (a) The processing, sale or offering for sale, transportation or delivery or receiving for transportation, [fol. D] in commerce or in a designated major consuming area of any poultry product, unless such poultry product has been inspected for wholesomeness and unless the shipping container, if any, *and the immediate container* are marked in accordance with the provisions of this Act.

• • • • • • •

> (d) Using in commerce or in any designated major consuming area, a false and misleading label on any poultry product." 21 USC 458. (Italics added.)

Ninth: Pursuant to the authority granted by the Poultry Products Inspection Act, the Secretary of Agriculture of the United States has issued regulations governing the manufacture and distribution of poultry and poultry products, including detailed regulations with respect to the labeling of such products. The pertinent sections of such regulations are set out below:

7 CFR 81.1 provides, in part:

> "'Administrator' means the Administrator of the Agricultural Marketing Service of the Department of Agriculture or any other officer or employe of the Department to whom there has heretofore been delegated or to whom there may hereafter be delegated the authority to act in his stead.
>
> * * * * * * *
>
> 'Department' means the United States Department of Agriculture."

7 CFR 81.125 provides:

> "Except as may be authorized by the Administrator with respect to shipments of products between official [fol. E] establishments, each shipping container and each immediate container of any product shall at the time it leaves the official establishment bear approved labels containing information in accordance with the provisions set forth in Sections 81.126 to 81.146, inclusive, and the act."

7 CFR 81.127 provides, in part:

> "No label, except printer's proofs bearing official identification shall be printed until the printer's proof or a photostatic copy has been found by the Administrator to be acceptable . . ."

7 CFR 81.130(a) provides:

> "Each label approved for use on an immediate container for poultry products shall bear in distinctly legible form the following information: (1) the common or usual name of the poultry product.
>
> (2) a statement of ingredients if fabricated from two or more ingredients, including a declaration as to artificial flavors, colors or preservatives, if any. Such ingredients shall be listed by their common or usual names in the order of their descending proportions.
>
> (3) the net weight or other appropriate measure of the contents, except that the Administrator may approve the use of labels for certain types of immediate containers which do not bear the net weight . . . "
>
> (4) the name and address of the packer or distributor and, when the name of the distributor is shown, it shall be qualified by such term as 'packed for', 'distributed by' or 'distributors'.
>
> [fol. F] (5) the official inspection mark . . . "

A copy of the full text of the regulation issued by the Secretary of Agriculture pursuant to the Poultry Products Inspection Act is attached to and made a part of this complaint as Exhibit "A".

Tenth: The manufacture, labeling, distribution and sale of frozen stuffed turkeys in interstate commerce are subject to all the provisions of the Poultry Products Inspection Act and the regulations issued thereunder. Plaintiff Armour's plants at Barron, Wisconsin, and Turlock, California, and plaintiff Swift's plant at Detroit Lakes, Minnesota, are operated within the authority of the Poultry Products Inspection Act and under the jurisdiction of the United States Department of Agriculture. Every operation in these plants is conducted under the continuous supervision of United States Department of Agriculture inspectors. The facilities of the plants and every label applied to every product produced therein is required to have and does have the prior approval of said Department.

Eleventh: Under Article I, Section 8, Class 3, of the Constitution, Congress has the power to regulate the labeling of products moving in interstate commerce until the product has come into the possession of the ultimate consumer. In the exhaustive provisions of the Poultry Products Inspection Act and the broad grant of power to the Secretary of Agriculture to issue regulations thereunder, the Congress has exercised its power to the fullest with regard to poultry and poultry products.

Twelfth: The plastic containers in which plaintiffs wrap their frozen stuffed turkeys are consumer packages and, as such, are governed by the provisions of the Poultry Products Inspection Act and the regulations issued thereunder which regulate the labeling of the "immediate container" of poultry or poultry products. The wording of the labels of said plastic wrappers has been approved by [fol. G] the United States Department of Agriculture pursuant to the Poultry Products Inspection Act and the regulations issued thereunder. A sample of the plastic wrapper approved for such use by the plaintiff Armour is attached to and made a part of this complaint as Exhibit "B" hereof. A sample of the plastic wrapper approved for such use by the plaintiff Swift is attached to and made a part of this complaint as Exhibit "C" hereof.

Thirteenth: The labels on said plastic wrappers of frozen stuffed turkeys approved by the United States Department of Agriculture provide for a statement of the net weight of the contents on said labels.

Fourteenth: By reason of the foregoing plaintiffs have a right under Federal law to manufacture, process, distribute, offer for sale and sell their frozen stuffed turkeys in interstate commerce enclosed in individual plastic wrappers bearing the approved label containing a statement of the net weight of the contents.

Fifteenth: Section 193 of the Agriculture and Markets Law of the State of New York provides, in part, as follows:

> "2. All food and food products which are sold, offered or exposed for sale by wholesalers, packers, distribu-

> tors, or jobbers shall be sold or offered for sale by net weight, numerical count or standard measure, whichever term shall be applicable . . ."
>
> 3. All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the Commissioner."

Sixteenth: Pursuant to the authority granted under the above-quoted Section, the Commissioner of Agriculture and Markets of the State of New York has promulgated the following regulation:

> [fol. H] 221.40 Meat, Poultry and Fish. Meat, poultry and fish shall be sold or offered for sale as food at retail by net weight only.

Seventeenth: Defendant has invoked Section 193 of the Agriculture and Markets Law of the State of New York and the quoted regulation to require that frozen stuffed turkey bear on its label a separate statement of the net weight of the turkey, the net weight of the stuffing and the total net weight. Furthermore, defendant through his authorized agents, as well as weights and measures officials of the political subdivisions of the State of New York, has notified actual and potential wholesale and retail customers of plaintiffs that the sale of frozen stuffed turkeys whose labeling does not comply with his said interpretations will constitute a violation of the law and will result in prosecution. In addition, he has condoned and acquiesced in publicity releases furnished to newspapers within the State of New York which advised the consuming public not to buy frozen stuffed turkeys unless they bear labels stating the separate weight of the turkey, the stuffing, and the total weight.

Eighteenth: Early in 1962, plaintiff Swift sold its frozen stuffed turkeys to a retail dealer in New York City who resold to the public. This sale and resale resulted in the successful prosecution of both Swift and the retailer in the Criminal Court of the City of New York for violation of Section 193 of the Agriculture and Markets Law. The violation consisted of a failure to state separately the net weight of the turkey, the net weight of the stuffing and the total net weight.

Nineteenth: Prior to the activities alleged in paragraph Seventeenth herein and the incident alleged in paragraph Eighteenth herein, the Metropolitan New York City area was the largest single market in the country for plaintiffs' [fol. I] frozen stuffed turkeys. As a result of the activities and incidents referred to, plaintiffs have been unable to make any sales of these products in New York City and many other areas of New York State since early 1962. Furthermore, the increased activities of defendant and his authorized agents in the past several months will shortly and inevitably result in plaintiffs being totally barred from the sale of their frozen stuffed turkeys in the entire State of New York.

Twentieth: Because of the severe injury caused to their business by the foregoing, both plaintiffs herein applied separately to the Department of Agriculture of the United States for approval of a label on their frozen stuffed turkeys which would separately show the net weight of the turkey, the net weight of the dressing and the total net weight. These applications were not approved, the Department of Agriculture holding fast to its requirement that the net weight statement on the labels be confined to the net weight of the contents.

Twenty-First: Thus, plaintiffs are placed in a position whereby it is impossible for them to label their frozen stuffed turkeys in compliance with both Federal and New York requirements. If the product is labeled in accordance with Federal requirements, it is barred from sale in the State of New York. On the other hand, if labeled to comply with New York requirements, the product will not be permitted to be shipped in interstate commerce.

Twenty-Second: By reason of the foregoing, plaintiffs have been irreparably damaged in that they have been and are prevented from distributing, offering for sale or selling their frozen stuffed turkeys in the City and State of New York, thereby seriously injuring plaintiffs in their business and legitimate interstate trade.

[fol. J] Twenty-Third: Section 193 of the Agriculture and Markets Law of the State of New York and the aforesaid actions of defendant constitute a wrongful interference with the exclusive power of Congress over interstate commerce and a constitutionally prohibited burden thereon in violation of Article I, Section 8, Clause 3, of the United States Constitution; are illegal, arbitrary, discriminatory and in direct conflict with the statutes of the United States and the regulations promulgated thereunder in violation of Article VI, Clause 2, of the United States Constitution; and deny the plaintiffs due process and the equal protection of the law in violation of Amendment XIV, Section 1, of the United States Constitution.

Twenty-Fourth: There is an actual controversy existing between plaintiffs and defendant under the Federal Declaratory Judgment Act and no adequate remedy is available at law to plaintiffs.

Wherefore, plaintiffs request:

1. That this court take jurisdiction of this matter; that a special three-judge court be called to hear and determine this case as by law provided in 28 USC, Sections 2281, *et seq.*

2. That the court declare that Section 193 of the Agriculture and Markets Law of the State of New York, as invoked by the defendant to require a label on frozen stuffed turkeys showing the separate net weight of the turkey and the stuffing together with the total net weight is unconstitutional as violative of Article I Section 8 Clause 3, Article VI Clause 2 and Amendment XIV Section 1 of the United States Constitution.

3. That the court declare that plaintiffs have the right to sell their frozen stuffed turkeys to their distribu- [fol. K] tors and customers in the State of New York for resale at wholesale or retail therein bearing labels approved for use on the consumer packages thereof by the United States Department of Agriculture.

4. That the court declare that retailers, wholesalers and distributors who are customers of plaintiffs may resell at wholesale and retail in the State of New York and advertise for sale therein, said stuffed turkeys bearing labels approved for use on the consumer packages thereof by the United States Department of Agriculture.

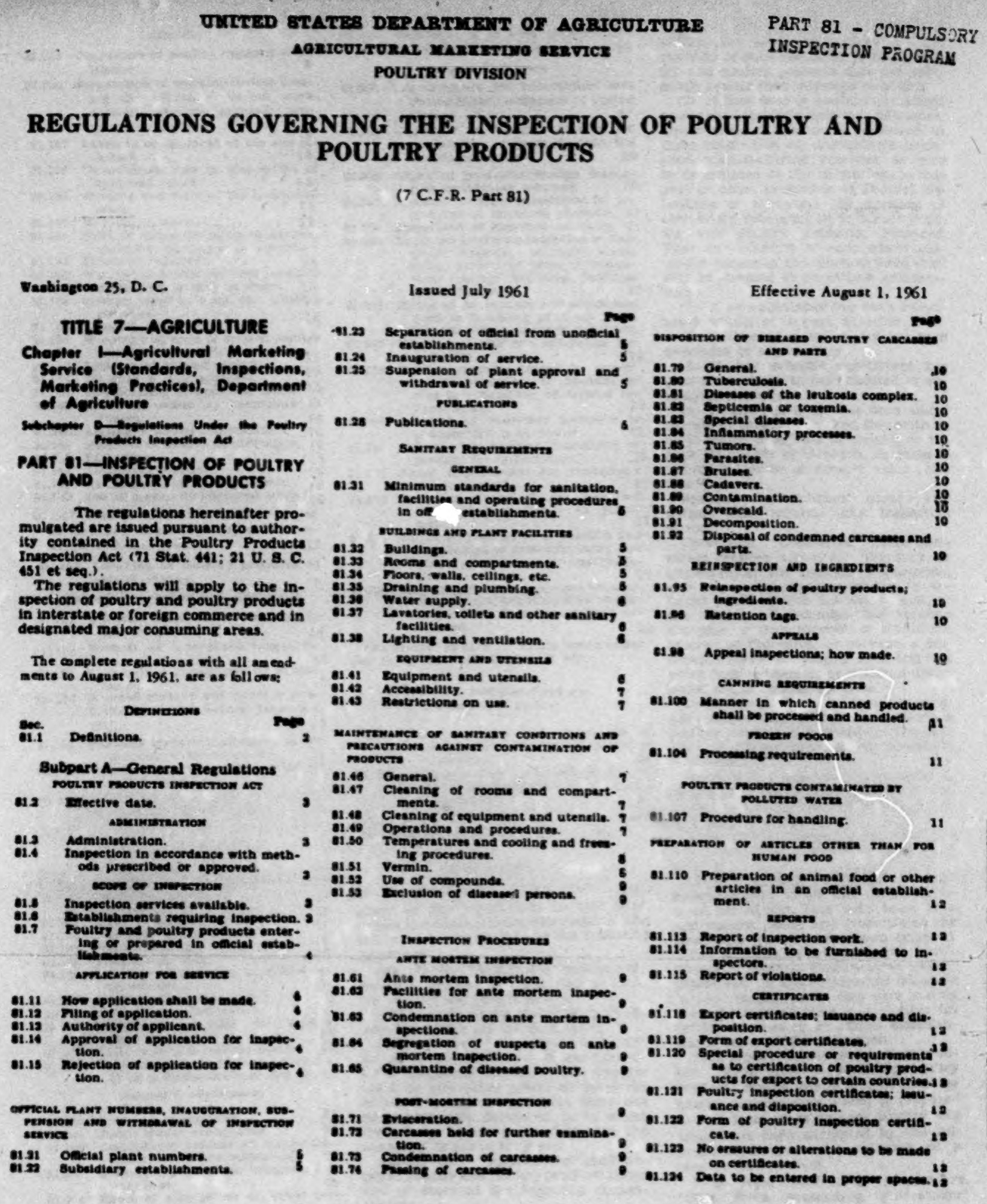
5. That defendant be enjoined from committing the acts herein complained of or from interfering in any manner with plaintiffs' business in the sale and distribution of frozen stuffed turkeys sold or shipped in interstate commerce in consumer packages bearing labeling approved by the United States Department of Agriculture or with resale and advertising thereof in the State of New York.

6. That the court grant such other and further relief which may be deemed just and proper.

William J. Condon, Attorney for plaintiff Swift & Company, Inc., Office and P.O. Address, 19 West 44th Street, New York 36, New York.

Evans, Orr, Gourlay & Pacelli, By: Evans, Orr, Gourlay & Pacelli, Attorneys for plaintiff Armour and Company, Office and P.O. Address, 15 Park Row, New York 38, New York.

EXHIBIT "A" TO AMENDED COMPLAINT



PART 81 - COMPULSORY
INSPECTION PROGRAM

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
POULTRY DIVISION

REGULATIONS GOVERNING THE INSPECTION OF POULTRY AND POULTRY PRODUCTS

(7 C.F.R. Part 81)

Washington 25, D. C.

Issued July 1961

Effective August 1, 1961

TITLE 7—AGRICULTURE

Chapter I—Agricultural Marketing Service (Standards, Inspections, Marketing Practices), Department of Agriculture

Subchapter D—Regulations Under the Poultry Products Inspection Act

PART 81—INSPECTION OF POULTRY AND POULTRY PRODUCTS

The regulations hereinafter promulgated are issued pursuant to authority contained in the Poultry Products Inspection Act (71 Stat. 441; 21 U. S. C. 451 et seq.).

The regulations will apply to the inspection of poultry and poultry products in interstate or foreign commerce and in designated major consuming areas.

The complete regulations with all amendments to August 1, 1961, are as follows:

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AUTHORITY: §§ 81.400 and 81.401 issued under sec. 14, 71 Stat. 447; 21 U.S.C. 463.

DEFINITIONS

§ 81.1 *Definitions.* For the purposes of the regulations in this part, unless the context otherwise requires, the following terms shall have the following meanings:

Acceptable. "Acceptable" means suitable for the purpose intended and acceptable to the Administrator.

Act. "Act" means the Poultry Products Inspection Act (71 Stat. 441.).

Administrator. "Administrator" means the Administrator of the Agricultural Marketing Service of the Department or any other officer or employee of the Department to whom there has heretofore been delegated, or to whom there may hereafter be delegated the authority to act in his stead.

Adulterated. "Adulterated" shall apply to poultry and poultry products under one or more of the following circumstances:

(1) If they bear or contain any poisonous or deleterious substance which may render them injurious to health, but, in case the substance is not an added substance, such poultry and poultry products shall not be considered adulterated under this clause if the quantity of such substance in such poultry and poultry products does not ordinarily render then injurious to health.

(2) If they bear or contain any added poisonous or added deleterious substance, unless such substance is permitted in their production or unavoidable under good manufacturing practices as may be determined by the regulations in this part or other provisions of Federal law limiting or tolerating the quantity of such added substance on or in such poultry and poultry products: *Provided*, That any quantity of such added substance exceeding the limits so fixed shall also be deemed to constitute adulteration.

(3) If any substance has been substituted, wholly or in part, therefor.

(4) If damage or inferiority has been concealed in any manner.

(5) If any valuable constituent has been in whole or in part omitted or abstracted therefrom.

(6) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

Applicant. "Applicant" means any person who requests any inspection service.

Commerce. "Commerce" means commerce between any State, Territory, or possession or the District of Columbia, and any place outside thereof; or between points within the same State, or the District of Columbia, but through any place outside thereof; or within the District of Columbia, or between a designated major consuming area and any point outside thereof; or within a designated major consuming area.

Consumer package. "Consumer package" means any container in which a poultry product is enclosed for the purpose of display and sale to household consumers.

Container or package. "Container or package" includes any box, can, tin, cloth, plastic, or any other receptacle, wrapper, or cover.

Department. "Department" means the United States Department of Agriculture.

Dressed poultry. "Dressed poultry" means poultry which has been slaughtered for human food with head, feet, and viscera intact and from which the blood and feathers have been removed.

Dressed poultry identification mark. "Dressed poultry identification mark" means the symbol formulated pursuant to the regulations in this part stating that the dressed poultry is eligible for further processing in official establishments under USDA inspection.

Food product containing poultry product. "Food product containing poultry product" means any article of food for human consumption which is prepared in part from ready-to-cook poultry, but which has been exempted by the Administrator from the category of a poultry food product.

Free from protruding pinfeathers. "Free from protruding pinfeathers" means that the carcass is free from protruding pinfeathers which are visible to an inspector during an examination [illegible] the carcass at normal operating speeds. However, a carcass may be considered as being free from protruding pinfeathers if it has a generally clean appearance (especially on the breast), and if not more than an occasional protruding pinfeather is in evidence during a more careful examination of the carcass.

Giblets. "Giblets" means the liver from which the bile sac has been removed, the heart from which the pericardial sac has been removed, and the gizzard from which the lining and contents have been removed: *Provided*, That each such organ has been properly trimmed and washed.

Immediate container. The term "immediate container" includes any consumer package; or any other container in which poultry carcasses or poultry products, not consumer packaged, are packed.

Inspected for wholesomeness. "Inspected for wholesomeness" means, with respect to any poultry product, that it has undergone an inspection and was found at the time of such inspection to be wholesome and not adulterated.

Inspection. "Inspection" means any ante mortem examination of poultry or any post-mortem inspection of dressed poultry at the time of evisceration or any inspection by an inspector to determine in accordance with the regulations in this part (1) the wholesomeness of any poultry product at any stage of the preparation or packaging thereof in the official establishment where inspected for wholesomeness, or (2) the wholesomeness of any previously inspected poultry product if such poultry product has not lost its identity as an inspected product.

Inspection service. "Inspection service" means the official service within the Department having the responsibility for carrying out the provisions of the Poultry Products Inspection Act. Inspection service also means the activities performed, including official reporting, by such official service.

Inspector. "Inspector" means (1) an employee or official of the United States Government, authorized by the Administrator to inspect poultry and poultry products, pursuant to the regulations in this part, or (2) an employee or official of any State government, authorized by the Administrator to inspect poultry and poultry products, pursuant to the regulations in this part, under an agreement entered into between the Agricultural Marketing Service and the appropriate State agency.

Label. "Label" means any written, printed, or graphic material upon the shipping container, if any, or upon the immediate container, including but not limited to an individual consumer package of the poultry product, or accompanying such product.

Official establishment. "Official establishment" means any establishment as determined by the Administrator at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained pursuant to the regulations in this part.

Official identification. "Official identification" means the official inspection mark or the dressed poultry identification mark.

Official inspection mark. "Official inspection mark" means the symbol, formulated pursuant to the regulations in this part, stating that the poultry product was inspected.

Person. "Person" means any individual, partnership, corporation, association, or any other business unit.

Potable water. "Potable water" means water that has been approved by the State health authority or agency or laboratory acceptable to the Administrator as safe for drinking, and suitable for food processing.

Poultry. "Poultry" means any live or slaughtered domesticated bird (chickens, turkeys, ducks, geese or guineas).

Poultry food product. "Poultry food product" means any human food product consisting of any edible part or parts of poultry in combination with other ingredients unless such human food product is exempted by the Administrator.

Poultry product. "Poultry product" means any ready-to-cook poultry or any poultry food product.

Product. "Product" means dressed poultry or poultry product or both.

Ready-to-cook poultry. "Ready-to-cook poultry" means any dressed poultry from which the protruding pinfeathers, vestigial feathers (hair or down as the case may be), head, shanks, crop, oil gland, trachea, esophagus, entrails, reproductive organs and lungs have been removed, and with or without the giblets, is ready to cook without need of further processing. Ready-to-cook poultry also means any cut-up or disjointed portion of poultry or any edible part thereof, as described in this paragraph.

Regulations. "Regulations" means the provisions of this entire part.

Secretary. "Secretary" means the Secretary of the Department, or any other officer or employee of the Department to whom there has heretofore been delegated or to whom there may hereafter be delegated, the authority to act in his stead.

Shipping container. "Shipping container" means any container used or intended for use in packaging the product packed in an immediate container.

Slaughter. "Slaughter" means the act of killing poultry for human food in accordance with good commercial practices in a manner which will result in thorough bleeding of the carcasses.

Unwholesome. "Unwholesome" means:

(1) Unsound, injurious to health, or otherwise rendered unfit for human food.

(2) Consisting in whole or in part of any filthy, putrid, or decomposed substance.

(3) Processed, prepared, packed, or held under unsanitary conditions whereby a poultry carcass or parts thereof or any poultry product may have become contaminated with filth or whereby a poultry product may have been rendered injurious to health.

(4) Produced in whole or in part from poultry which has died otherwise than by slaughter.

(5) Packaged in a container composed of any poisonous or deleterious substance which may render the contents injurious to health.

Wholesome. "Wholesome" means sound, healthful, clean, and otherwise fit for human food.

Subpart A—General Regulations

POULTRY PRODUCTS INSPECTION ACT

§ 81.2 *Effective date.* The Poultry Products Inspection Act became effective on August 28, 1957. However, no person is subject to the provisions of this act prior to January 1, 1959, unless such person, after January 1, 1958, applies for and receives inspection for poultry or poultry products pursuant to the act and the regulations in this part. Any person who voluntarily applies for and receives such inspection after January 1, 1958, shall be subject, on and after the date he commences to receive such inspection, to all of the provisions and penalties provided for in the Poultry Products Inspection Act with respect to all poultry or poultry products handled in the establishment for which said application for inspection is made.

ADMINISTRATION

§ 81.3 *Administration.* The Administrator shall perform, for and under the supervision of the Secretary, such duties as are prescribed in the regulations in this part and as the Secretary may require in the administration of the regulations in this part. The Administrator is authorized to waive for limited periods any particular provisions of the regulations to permit experimentation so that new procedures, equipment and processing techniques may be tested to facilitate definite improvements: *Provided*, That such variations from the provisions of the regulations are not in conflict with the purposes of the act. The Administrator is authorized to grant exemptions in accordance with the provisions of the act.

§ 81.4 *Inspection in accordance with methods prescribed or approved.* Inspection of poultry products shall be rendered pursuant to the regulations in this part and under such conditions and in accordance with such methods as may be prescribed or approved by the Administrator.

SCOPE OF INSPECTION

§ 81.5 *Inspection services available.* The regulations in this part provide for inspection service pursuant to the provisions of the Poultry Products Inspection Act.

§ 81.6 *Establishments requiring inspection.* (a) Every establishment in which poultry is slaughtered for transportation or sale in commerce, or for transportation from an official establishment to another official establishment, and every establishment in which poultry products are prepared for transportation or sale in commerce shall have inspection under the regulations in this part, except as expressly exempted in this part.

(b) The term "prepared" as used in this section means any operation or combination of operations, whereby poultry is eviscerated, cut up, heat treated, canned, packed, labeled, or changed in size, shape or form, and includes the combining of poultry products with other edible ingredients. It does not refer to freezing of poultry or poultry products after they have been shipped from an official establishment, except when freezing is a part of the processing operations of such establishment in which case the provisions of §§ 81.50 and 81.104 shall apply.

§ 81.7 *Poultry and poultry products entering or prepared in official establishments.*

All poultry and poultry products processed in an official establishment shall be inspected, handled, prepared, marked and labeled as required by the regulations in this part, and all dressed poultry and poultry products entering an official establishment shall have been inspected and shall be marked as required by the regulations in this part.

APPLICATION FOR SERVICE

§ 81.11 *How application shall be made.* The proprietor or operator of each establishment of the kind specified in § 81.6 shall make application to the Administrator for inspection service. Every application under this section shall be made on a form furnished by the Inspection Service. In cases of change of name or ownership or change of location, a new application shall be made.

§ 81.12 *Filing of application.* An application for inspection service shall be regarded as filed only when it has been filled in completely and signed by the applicant and has been received in the office of the Administrator.

§ 81.13 *Authority of applicant.* Proof of authority of any person applying for inspection service may be required at the discretion of the Administrator.

§ 81.14 *Approval of application for inspection.* An application for inspection service to be rendered in an official establishment shall be approved according to the following procedure:

(a) *Drawings and specifications to be furnished.* (1) Applicants for inspection service may request and obtain information or assistance from the Inspection Service with respect to the requirements before submitting drawings and specifications.

(2) Four copies of drawings or blueprints showing the features specified herein shall be submitted to the Administrator. The drawings or blueprints shall be legible, made with sharp, clear lines, be properly drawn to scale, and shall consist of floor plans and a plot plan. Drawings or blueprints consisting of more than one sheet shall be bound together at the left margin in sets.

(3) The plot plan shall show such features as the limits of the plant's premises, locations in outline of buildings on the premises, one point of the compass, and the location of roadways, railroads and water and sewer lines or sewage facilities serving the plant.

(4) The floor plan shall show all space to be included in the official establishment. If rooms or compartments shown on the drawings are not to be included as part of the official establishment, this shall be clearly indicated thereon.

(5) The sheets of paper on which drawings or blueprints are made shall not exceed a size of 34'' x 44''. The drawings other than of the plot plan, shall be made to a scale of ⅛'' per foot, except that additional plans for some areas showing detail may be drawn to a scale of ¼'' per foot. The plot plan may be drawn to a scale of not less than $\frac{1}{32}$'' per foot. The drawings shall indicate the scale used and shall also indicate the floor shown (i. e., basement, first, or second).

(b) *Features required to be shown on floor plan.* The following features shall be shown on the floor plan:

(1) The principal pieces of equipment drawn to scale in the proper locations.

(2) The name of the firm and the address of the plant by street and street number, or by other means properly identifying the location of the plant.

(3) One point of the compass.

(4) The doors and openings for passageways, designating those which are self-closing or permanently closed.

(5) All floor drain openings and gutter drains, and for all buildings constructed after September 1, 1959, the approximate location of all underfloor and underground piping.

(6) Lavatories in toilet and processing rooms (lavatories which are other than hand-operated shall be so designated on the blueprints).

(7) All steam, hot and cold water outlets for clean-up purposes.

(8) Ice making and storage facilities.

(9) The point at which live poultry is hung on the conveyor line, the point where dressed poultry is removed, and the point of transfer to the eviscerating line.

(10) The routes of the edible and inedible products.

(11) The location of fresh air inlets, exhaust fans and hoods.

(c) *Specifications.* Specifications covering the following notations shall accompany the drawings:

(1) Height of ceilings.

(2) Type of ceilings—open or closed.

(3) Finish of ceilings; for example—cement plaster, metal, marine plywood, cement, asbestos board, etc.

(4) Finish of walls; for example—cement plaster, glazed tile, glazed brick, glass blocks, etc.

(5) Screens—indicate whether all outside openings are screened or provided with other suitable devices against entrance of flies or other insects.

(6) Finish of floors—concrete, brick, mastic material, etc.

(7) Drainage—indicate amount of slope of floors to the drains in processing rooms, coolers, toilets, and refuse rooms, and give description of trapping and venting of drainage lines, and of floor drain openings. Indicate size of drainage lines and whether house drainage lines and toilet soil lines are separate to a point outside of buildings.

(8) Heating—indicate type.

(9) Water supply—indicate whether public or private water supply, or both, and specify in terms of gallons per minute of water available for the processing needs of the plant. Also indicate whether or not a nonpotable water supply is used for any purpose in the plant and, if so, specify such uses.

(10) Hot water facilities—specify facilities such as boilers, storage tanks, mixing valves, etc., and indicate the size

(11) Specify number of men and number of women who will use each toilet room.

(12) Sewage disposal—indicate whether city sewer, cesspool, sedimentation tank, etc.

(13) Approximate rate of production—indicate hourly rate of slaughter and evisceration for each class of poultry.

(d) *Rooms and compartments which must be included in the official establishment.* The official establishment shall include employees' toilet and dressing rooms, office space for the inspectors, storerooms for supplies, refuse rooms, and all rooms, compartments or passageways where poultry or poultry products, or any ingredients to be used in the preparation of products under inspection will be handled or kept. It also may include other rooms or compartments located in the buildings comprising the official establishment.

(e) *Changes in drawings or blueprints.* When changes are proposed in areas for which drawings have been previously approved, one of the following types of revised drawings shall be submitted for review and consideration:

(1) A completely revised sheet or sheets, showing proposed alterations or additions, or

(2) Approved pasters of the proposed changes which may be affixed to the affected areas on the previously approved blueprints in a manner not obscuring essential data. Paster drawings shall be prepared to the same scale and presented on a background similar to that of the originally approved drawing.

(f) *Use of information on file for plants operating under voluntary inspection service.* Applicants whose plants have been surveyed and are operating under voluntary inspection service pursuant to regulations (Part 70 of this chapter) in effect on the date service is made available under the Poultry Products Inspection Act will be exempt from the requirements of this section to the extent that the Administrator may determine that information and materials required by the provisions of this section are already available in official files of the Inspection Service.

(g) *Survey and plant approval.* Prior to the inauguration of the inspection service, a survey of the plant and premises shall be made by a representative of the Inspection Service to determine if the plant is constructed and facilities are installed in accordance with the approved drawings, specifications and the regulations in this part. The application for inspection service may be granted and the plant may be approved by the Administrator only when these requirements have been met. The Administrator may terminate plant approval of any official establishment in which inspection service has been discontinued.

(h) *Order of service.* On the date when service is inaugurated under this act all establishments that are approved pursuant to the regulations in this part will be granted inspection service simultaneously subject to the availability of funds and qualified inspectors. Thereafter, applications will be considered in the order received and service will be installed in the order of approval of establishments subject to the availability of inspectors and funds to provide service.

§ 81.15 *Rejection of application for inspection.* Any application for inspection service may be rejected by the Administrator whenever the applicant fails to meet the requirements of the regulations prescribing the conditions under which inspection service is made available, or if he determines that any false statement was made in such application.

OFFICIAL PLANT NUMBERS, INAUGURATION, SUSPENSION AND WITHDRAWAL OF INSPECTION SERVICE

§ 81.21 *Official plant numbers.* An official plant number shall be assigned to each establishment granted inspection service. Such plant number shall be used to identify all containers of inspected products prepared in the establishment. An establishment shall not have more than one plant number.

§ 81.22 *Subsidiary establishments.* When inspection service has been granted to a person at an establishment, it shall not be granted to any other person at the same establishment, except that a subsidiary of the grantee, doing any of the business described in § 81.6 may apply for and receive inspection at such establishment.

§ 81.23 *Separation of official from unofficial establishments.* Each official establishment shall be separate and distinct from any other official establishment and from any unofficial establishment. Doorways, or other openings, may be permitted between establishments only at the discretion of the Administrator and under such conditions as he may prescribe.

§ 81.24 *Inauguration of service.* The inspector in charge or his supervisor shall, upon or prior to the inauguration of service, inform the proprietor or operator of the establishment of the requirements of the regulations in this part. If the establishment at the time service is inaugurated contains any product which has not been inspected and marked in compliance with the regulations, its identity shall be maintained, and it shall not be represented or dealt with as a product which has been inspected. Such products may be shipped in commerce as provided in § 81.154.

§ 81.25 *Suspension of plant approval and withdrawal of service.* (a) Any establishment approval given pursuant to the regulations may be suspended by the Administrator for (1) failure to maintain premises, facilities, and equipment in a satisfactory state of repair; (2) the use of operating procedures or practices which are not in accordance with the regulations; or (3) alterations of buildings, facilities, or equipment which have not been approved in accordance with the regulations.

(b) During such period of suspension, no processing of poultry or poultry products for commerce shall be carried on in the official establishment. If the plant facilities or methods of operation are not brought into compliance within a reasonable period of time, to be specified by the Administrator, inspection service shall be withdrawn from the official establishment. Upon withdrawal of inspection service in an official establishment, the plant approval shall also become terminated.

PUBLICATIONS

§ 81.28 *Publications.* Publications under the act and the regulations in this part shall be made in the FEDERAL REGISTER, and in the Service and Regulatory Announcements of the Department or in such other media as the Administrator may designate. Such publications will be available to applicants for inspection service.

SANITARY REQUIREMENTS

GENERAL

§ 81.31 *Minimum standards for sanitation, facilities and operating procedures in official establishments.* The provisions of §§ 81.32 to 81.53, inclusive, shall apply with respect to inspection service in all official establishments.

BUILDINGS AND PLANT FACILITIES

§ 81.32 *Buildings.* The buildings shall be of sound construction and kept in good repair.

(a) *Outside openings.* (1) The doors, windows, skylights and other outside openings of the plant, except in receiving rooms and feeding rooms, shall be protected by properly fitted screens or other suitable devices, against the entrance of flies and other insects.

(2) Outside doors, except in receiving rooms and feeding rooms, shall be so hung as to be close fitting when closed. Doors shall be provided with self-closing devices where necessary to prevent the entry of vermin into processing and storage rooms.

§ 81.33 *Rooms and compartments.* Rooms or compartments used for edible products shall be separate and distinct from inedible products departments and from rooms where live poultry is held or slaughtered. Separate rooms shall be provided when required for conducting processing operations in a sanitary manner; and all rooms shall be of sufficient size to permit the installation of the necessary equipment for processing operations and the conduct of such operations in a sanitary manner.

(a) *Refuse rooms.* A separate refuse room, or other equally adequate facilities, shall be required in official establishments where accumulations of refuse occur. Refuse rooms shall be entirely separate from other rooms in the establishment, shall have tight fitting doors, be properly ventilated, have adequate drainage, and the floors and walls to a height of six feet above the floor shall be impervious to moisture, and walls above that height and ceilings shall be moisture resistant.

(b) *Rooms for holding carcasses for further inspection.* Rooms or other acceptable facilities in which carcasses or parts thereof are held for further inspection shall be in such numbers and such locations as the needs of the inspection in the establishment may require. These rooms or facilities shall be equipped with hasps for locking.

(c) *Coolers and freezers.* Coolers and freezers shall be of such size and capacity as are required for compliance with the provisions set forth in § 81.50. Freezing rooms, other than those for plate freezers or liquid freezing, shall have forced air circulation and freezers and coolers shall be equipped with floor racks or pallets unless other means are used which will assure that products will be maintained in a wholesome condition.

(d) *Storage and supply rooms.* The storage and supply rooms shall be kept in good repair, dry, and sanitary.

(e) *Boiler room.* The boiler room shall be a separate room where necessary to prevent dirt and objectionable odors entering from it into any room where dressed poultry or poultry products are prepared, handled, or stored.

(f) *Inspector's office.* Office space, including, but not being limited to furnishings, light, heat and janitor service, shall be provided rent free in the official establishment, for the use of Government personnel for official purposes. The room or space set apart for this purpose must meet the approval of the Inspection Service and be conveniently located, properly ventilated, and provided with lockers or file cabinets suitable for the protection and storage of supplies and with facilities suitable for inspectors to change clothing.

(g) *Toilet rooms.* Toilet rooms, opening directly into rooms where poultry products are exposed shall have self-closing doors and shall be ventilated to the outside of the building.

(h) *Lunch rooms.* Lunches and snacks shall not be eaten in processing, packing, or supply rooms. If needed, separate rooms or areas shall be provided in establishments where employees eat their lunches.

§ 81.34 *Floors, walls, ceilings, etc.*—(a) *Floors.* All floors in rooms where exposed products are prepared or handled shall be constructed of, or finished with materials impervious to moisture, so they can be readily and thoroughly cleaned. The floors in killing, ice cooling, ice packing, eviscerating, cooking, boning and cannery rooms shall be graded for complete runoff with no standing water.

(b) *Walls, posts, partitions, doors.* All walls, posts, partitions, and doors in rooms where exposed products are prepared or handled shall be smooth and constructed of materials impervious to moisture to a height of six feet above the floor to enable thorough cleaning. All surfaces above this height must be smooth and finished with moisture-resistant material.

(c) *Ceilings.* Ceilings must be moisture-resistant in rooms where exposed products are prepared or handled, finished and sealed to prevent collection of dirt or dust that might sift through floor above or fall from collecting surfaces on equipment or exposed product.

§ 81.35 *Draining and plumbing.* There shall be an efficient draining and plumbing system for the plant and premises.

(a) *Drains and gutters.* All drains and gutters shall be properly installed with approved traps and vents. The drainage and plumbing system must permit the quick runoff of all water from plant buildings, and of surface water around the plant and on the premises; and all such water shall be disposed of in such a manner as to prevent a nuisance or health hazard.

(b) *Sewage and plant wastes.* (1) The sewage system shall have adequate slope and capacity to remove readily all waste from the various processing operations and to minimize and, if possible, prevent stoppage and surcharging of the system; (2) grease traps which are connected with the sewage system shall be suitably located, but not near any edible products department or in any area where products are unloaded from, or loaded into vehicles. To facilitate cleaning, such traps shall have inclined bottoms and be provided with suitable covers; (3) all floor drains shall be equipped with traps, constructed so as to minimize clogging; and the plumbing shall be installed so as to prevent sewage from backing up and flooding the floor;

(4) Toilet soil lines shall be separate from house drainage lines to a point outside the buildings unless an automatic backwater check valve is installed to prevent back-flow. Drainage from toilet bowls and urinals shall not be discharged into a grease catch basin, nor shall such drainage be permitted to enter the sewer lines at a point where there might be a possibility of such drainage backing up and flooding the floor of the building.

§ 81.36 *Water supply.* Except as provided in paragraph (d) of this section, the water supply shall be ample, clean, and potable with adequate pressure and facilities for its distribution in the plant, and its protection against contamination and pollution. A water report, issued under the authority of the State health agency, certifying to the potability of the water supply, shall be obtained by the applicant and furnished to the Administrator whenever such report is required by the Administrator.

(a) An adequate supply of hot water to enable proper cleaning shall be available.

(b) Hose connections with steam and water mixing valves or hot water hose connections shall be provided at convenient locations throughout the plant for cleaning purposes.

(c) The refuse rooms shall be provided with adequate facilities for washing refuse cans and other equipment in the rooms.

(d) Nonpotable water is permitted only in those parts of official plants where no product is handled or prepared, and then only for limited purposes such as on condensers not connected with the potable water supply, in vapor lines serving inedible product rendering tanks, and in sewer lines for moving heavy solids in the sewage. Nonpotable water is not permitted for washing floors, areas, or equipment, nor is it permitted in boilers, scalder, chill vats or ice making machines. In all cases, nonpotable water lines shall be clearly identified and shall not be cross connected with the potable water supply unless this is necessary for fire protection. Any such connection must have an adequate break to assure against accidental contamination, and must be approved by local authorities and by the Administrator. Any untested water supply in an official establishment shall be treated as a nonpotable supply

§ 81.37 *Lavatories, toilets, and other sanitary facilities.* Modern lavatory and toilet accommodations and properly located facilities for cleaning utensils and hands shall be provided.

(a) Adequate lavatory and toilet accommodations, including but not being limited to, running hot and cold water, soap or other acceptable agents (in sanitary dispensers), toilet tissue, and towels or other acceptable facilities for drying hands, shall be provided. Lavatories shall be in or near toilet and locker rooms and also at other places in the plant as may be essential to the cleanliness of all personnel handling products.

(b) Adequate lockers or other facilities, shall be provided for employees' wearing apparel, and for the storing and changing of clothing. Wearing apparel shall not be stored in rooms where processing operations are conducted.

(c) Suitable containers shall be provided for the temporary storage of soiled linen, coats, aprons, and other items of employees' uniforms or work clothing.

(d) Sufficient metal containers shall be provided for used towels and other wastes.

(e) An adequate number of hand washing facilities serving areas where dressed poultry and poultry products are prepared shall be operated by other than hand-operated controls, or shall be of a continuous flow type which provides an adequate flow of water for washing hands.

(f) Durable signs shall be posted conspicuously in each toilet room and locker room directing employees to wash their hands before returning to work.

(g) Adequate toilet facilities shall be provided and the following formula shall serve as a basis for determining the number of toilet bowls required:

Persons of same sex:	*Toilet bowls required*
1 to 15, inclusive	1
16 to 35, inclusive	2
36 to 55, inclusive	[1] 3
56 to 80, inclusive	[1] 4
For each additional 30 persons in excess of 80	[1] 1

[1] Urinals may be substituted for toilet bowls but only to the extent of one-third of the total number of bowls stated.

(h) Suitable sanitary drinking water facilites shall be provided.

(i) All toilets, lavatories, and other sanitary facilities shall be kept clean and in good repair.

§ 81.38 *Lighting and ventilation.* There shall be ample light, either natural or artificial or both, of good quality and well distributed, and sufficient ventilation for all rooms and compartments to insure sanitary conditions.

(a) All rooms in which poultry is killed, eviscerated, or otherwise processed shall have at least 30 foot candles of light intensity on all working surfaces, except that at the inspection stations such light intensity shall be of 50 foot candles. In all other rooms there shall be provided at least 5 foot candles of light intensity when measured at a distance of 30 inches from the floor.

(b) All rooms shall be adequately ventilated to eliminate objectionable odors and minimize moisture condensation.

EQUIPMENT AND UTENSILS

§ 81.41 *Equipment and utensils.* Equipment and utensils used for preparing, processing, or otherwise handling any product in the plant shall be suitable for the purpose intended and shall be of such material and construction as will facilitate their thorough cleaning and insure cleanliness in the preparation and handling of products. Trucks and receptacles used for handling inedible products shall be of similar construction, shall be conspicuously and distinctly marked, and shall not be used for handling any poultry products.

(a) *Refuse containers.* Leak-proof refuse containers with covers shall be provided except that perforated containers may be used for the temporary collection of feathers and such containers need not be covered.

(b) *Scalding equipment.* (1) Scalding tanks shall be constructed and installed so as to prevent contamination of potable water lines and to permit water to enter continuously at a rate which will result in a satisfactory scalding operation. The rate of flow necessary to maintain a sanitary scalding operation will be determined on such factors as the class of poultry and the number of birds per minute going into the scalding tank. It shall be the responsibility of the Station Supervisor to establish a minimum rate of flow for each scalding tank in each official establishment.

(2) The overflow outlets in scalding equipment shall be of sufficient size to permit feathers and water to be carried off.

(3) The overflow, draw-off valves, and sediment basin drain shall discharge into a floor or valley drain, or onto the floor in close proximity to a floor or valley drain.

(c) *Wax finishing.* When wax dipping is used, metal troughs shall be provided to catch the wax removed from the dipped poultry. Acceptable facilities and methods shall be employed in reclaiming the wax.

(d) *Ice shovels.* Ice shovels shall be smooth surfaced and entirely constructed of rust proof impervious material.

(e) *Conveyors.* (1) Conveyors used in the preparation of ready-to-cook poultry shall be of metal or other acceptable material and of such construction as to permit easy identification of viscera with its carcass and so designed as will present each carcass or all parts thereof in a way that will permit adequate and efficient inspection.

(2) Overhead conveyors shall be so constructed and maintained that they will not allow grease, oil, or dirt to accumulate on the drop chain or shackle which shall be of noncorrosive metal.

(3) Nonmetallic belt-type conveyors used in moving poultry products shall be of water-proof composition.

(4) When individual trays are not used during eviscerating operations, each carcass shall be suspended and a metal trough or a trough constructed of other acceptable impervious material shall be provided beneath the conveyor to extend from the point where the carcass is opened to the point where the viscera has been completely removed, and such troughs shall be flushed continuously by a water spray.

(f) *Chilling and defrosting tanks.* Chilling and defrosting tanks shall be constructed of metal or other suitable material impervious to moisture and shall be of seamless construction with edges rolled outward. Where mechanical devices are not used for removing carcasses from the chilling or defrosting tanks, the tanks shall be of a size that will enable employees to remove poultry without getting inside the tanks.

(g) *Tables.* Inspection, eviscerating, and cutting tables shall be made of metal or other acceptable material, have coved corners, and be constructed and placed so as to permit thorough cleaning.

(h) *Plants lacking conveyors.* In plants where no conveyors are used, each carcass shall be eviscerated in an individual metal tray of seamless construction or in a tray of other acceptable material and construction.

(i) *Water spray washing equipment.* Water spray washing equipment with sufficient water pressure to thoroughly and efficiently wash carcasses shall be used for washing carcasses inside and out.

(j) *Offal receptacles.* Watertight metal receptacles shall be used for entrails and other waste resulting from preparation of eviscerated poultry.

(k) *Trucks and receptacles for diseased carcasses.* Watertight trucks and receptacles for holding or handling diseased parts of carcasses shall be so constructed as to be readily and thoroughly cleaned; such trucks and receptacles shall be marked in a conspicuous manner with the word "condemned" in letters not less than 2 inches high and when required by the inspector in charge, shall be equipped with facilities for locking and sealing.

§ 81.42 *Accessibility.* All equipment shall be placed so as to be readily accessible for all processing and cleaning operations.

(a) *Mechanical pickers.* When mechanical pickers are used they shall be installed so as to be accessible for thorough cleaning and removal of the accumulation of feathers.

§ 81.43 *Restrictions on use.* Equipment and utensils used in the official establishment shall not be used outside the official establishment, except under such conditions as may be prescribed or approved by the Administrator. Equipment used in the preparation of any article (including, but not limited to, animal food), from inedible material shall not be used outside of the inedible products department except under such conditions as may be prescribed or approved by the Administrator.

MAINTENANCE OF SANITARY CONDITIONS AND PRECAUTIONS AGAINST CONTAMINATION OF PRODUCTS

§ 81.46 *General.* The premises shall be kept free from refuse, waste materials and all other sources of objectionable odors and conditions.

§ 81.47 *Cleaning of rooms and compartments.* Rooms, compartments, and other parts of the official establishment, shall be kept clean and in sanitary condition.

§ 81.48 *Cleaning of equipment and utensils.* Equipment and utensils used for preparing or otherwise handling any poultry or poultry product shall be kept clean, sanitary, and in good repair.

(a) Batteries and dropping pans shall be cleaned regularly and the manure removed from the plant daily.

(b) Scalding tanks shall be completely emptied and thoroughly cleaned as often as may be necessary, but not less frequently than once a day when in use.

(c) All equipment and utensils used in the killing, roughing, and pinning rooms shall be thoroughly washed and cleaned at least once daily when in use.

(d) The chilling and packing room and equipment and utensils used therein shall be maintained in a clean and sanitary condition.

(e) Chilling or defrosting tanks shall be emptied after each use. They shall be thoroughly cleaned at least once daily when in use, except that when the same poultry is held therein in excess of 24 hours, the tanks shall be thoroughly cleaned after the poultry is removed therefrom and prior to reuse.

(f) Conveyor trays or belts which come in contact with raw products shall be completely washed and sanitized after each use.

(g) Tables, shelves, bins, trays, pans, knives, and all other tools and equipment used in the preparation of ready-to-cook poultry shall, after cleaning, be drained on racks and shall not be nested.

§ 81.49 *Operations and procedures.* Operations and procedures involving the preparation, storing, or handling of any product shall be strictly in accord with clean and sanitary methods, and shall be conducted in such a manner as will result in sanitary processing, proper inspection, and the production of wholesome poultry and poultry products.

(a) Materials which create an objectionable condition shall not be handled or stored in rooms, compartments, or other places in the establishment where any product is prepared, stored, or otherwise handled.

(b) Poultry shall be slaughtered in such a manner that breathing has stopped prior to scalding. Blood from the killing operation shall be confined to a relatively small area.

(c) The pinning and finishing of dressed poultry shall be performed in a part of the room that is located sufficiently away from the killing and roughing operations to prevent contamination of the product.

(d) In finishing and cleaning dressed poultry, the vestigial feathers (hair or down as the case may be) shall be removed by singeing or other means, feed shall be removed from the crop without incising the tissues, and the fecal material in the cloaca shall be removed by venting. These operations shall be completed prior to, or during the final washing, but prior to chilling and packaging of such dressed poultry. Notwithstanding the foregoing, dressed poultry which is to be warm eviscerated is not required to be vented, and dressed poultry which is to be eviscerated in an official establishment within 72 hours from time of slaughter may, when approved by the Inspection Service be transferred by conveyor or operational type container or other approved means to such official establishment prior to removal of the feed in the crop.

(e) If dressed poultry is not to be immediately warm eviscerated, the head of each carcass shall be washed thoroughly either by automatic washer or manually to remove feed from the mouth and blood from the head and mouth.

(f) In the final washing of dressed poultry, the carcass shall be passed through a system of sprays providing an abundant supply of fresh clean water either under pressure or scrubbing action.

(g) When frozen ready-to-cook poultry is to be defrosted in water, it shall be thawed in continuous running tap water of sufficient volume to thaw such poultry. If ready-to-cook poultry is to be defrosted in water which is heated, the water shall not be heated above 70° F. except when such poultry is defrosted in cooking kettles and the temperature of the water will be raised to cooking temperature immediately after the poultry has become defrosted. Frozen dressed poultry shall not be defrosted in tanks with continuously running water or residual water, but shall be defrosted on metal racks or in perforated metal containers under a continuous water spray at a temperature not in excess of 70° F.

(h) Cuts for the removal of the viscera shall be limited to those necessary for proper processing operations and inspection. With respect to roaster style evisceration, opening cuts shall be made in such a manner that the skin between the thighs and rib cage will not be cut or torn open during the drawing operation. No additional cuts shall be made prior to chilling other than those necessary to perform the complete evisceration of the bird. With respect to poultry that is permitted to be opened by the "bar-cut" method, particular care shall be exercised in making transverse cuts so that the thigh areas will not be opened and the flesh at the posterior end of the keel will not be exposed. An occasional bird that is unintentionally opened in the aforesaid areas will be permitted. All birds which are opened by the "bar-cut" method shall be trussed (both legs) prior to chilling.

(i) The area at the junction of the neck with the body of the eviscerated bird shall be positively opened so that water will drain freely from the body cavity and not become trapped in the area between the neck skin and the neck.

(j) Ready-to-cook poultry shall be adequately drained to remove ice and free water prior to packaging or packing.

(k) Cut-up poultry shall be prepared from chilled carcasses (with or without necks) and the parts shall not be rechilled in ice and water or water but may be temporarily held in containers of crushed ice which are continuously drained pending further processing and packaging. Notwithstanding the foregoing, giblets and necks and certain parts resulting from special processing operations approved by the Administrator, may be chilled in agitated ice and water slush or refrigerated water for a period not in excess of 20 minutes.

(l) All offal resulting from the evisceration operation shall be removed from the establishment as often as necessary to prevent the development of a nuisance.

(m) Containers to be used for packaging dressed poultry and ready-to-cook poultry shall be clean, free from objectionable substances and odors and of sufficient strength and durability to protect the product adequately during normal distribution.

(n) Paper and other material used for lining barrels or other containers in which products are packed shall be of such kinds as do not tear readily during use but remain intact when moistened by the product. Wooden containers to be used for packing poultry shall be fully lined except when the individual birds to be packed therein are fully wrapped.

(o) Protective coverings shall be used for the product, in the plant and as it is distributed from the plant, which are adequate to protect the product against contamination by any foreign substances (including, but not being limited to, dust, dirt, and insects) considering the means intended to be employed in transporting the product from the plant.

(p) Cleanliness and hygiene of personnel:

(1) All persons coming in contact with exposed poultry products, or poultry products handling equipment shall wear clean garments and suitable head coverings to prevent hair from falling into poultry products; and shall keep their hands and fingernails clean at all times while thus engaged.

(2) All persons with infected cuts, boils, or open sores on their hands shall not handle dressed poultry or poultry products, or poultry products handling equipment.

(3) Every person shall wash his hands thoroughly after each use of toilet or change of garments before returning to duties that require the handling of dressed poultry or poultry products or containers thereof, or poultry products handling equipment.

(4) The use of tobacco in any form, the eating of food, or any other objectionable personal habit which may result in a nuisance or an unsanitary condition, shall not be permitted in any room where exposed dressed poultry or poultry products are being prepared, processed, or otherwise handled.

§ 81.50 *Temperatures and cooling and freezing procedures.* Temperatures and procedures which are necessary for cooling and freezing dressed and ready-to-cook poultry, including all edible portions thereof, shall be in accordance with operating practices which insure the prompt removal of the animal heat and will preserve the condition and wholesomeness of the poultry.

(a) *General cooling requirements.* All poultry that is prepared or processed in the official establishment shall be cooled immediately after processing so that the internal temperature is reduced to 40° F or less, unless such poultry is to be further processed immediately at the official establishment. Poultry to be shipped from the plant in packaged form shall be maintained at 40° F. or less, except that during further processing and packaging operations, the internal temperature may rise to a maximum of 55° F.: *Provided*, That immediately after packaging, the poultry is placed under refrigeration at a temperature that will promptly lower the product to 40° F. or less, or placed in a freezer promptly. Poultry which is to be held at the plant in packaged form in excess of 24 hours shall be held in a room at a temperature of 36° F. or less.

(b) *Ice and water chilling.* (1) Only ice manufactured or produced from potable water may be used for ice-water chilling. The ice shall be handled and stored in a sanitary manner. If of block type, the ice shall be washed by spraying all surfaces with clean water before crushing.

(2) Poultry carcasses shall be chilled to 40° F. or lower within the times specified below:

Weight of carcass:	*Time (hours)*
Under 4 pounds	4
4 to 8 pounds	6
Over 8 pounds	8

Such chilled poultry shall be maintained constantly at 40° F. or below until removed from the vats or tanks for immediate packaging. Poultry may be removed from the vats or tanks prior to being cooled to 40° F. or lower for freezing or for further processing in the official establishment. Poultry shall not be packed until after it has been chilled to 40° F. or below except when the packaging will be followed immediately by freezing at the official establishment.

(3) In order to facilitate continuous processing operations, poultry may be held overnight in chilling tanks containing water-saturated ice, refrigerated water, or other approved cooling media that will maintain all poultry in the tanks at a temperature of 40° F., or lower. Practices (such as re-icing, recirculation of the chilling medium, or holding product in refrigerated rooms, or use of increased amounts of ice) shall be employed that will result in all of the poultry in the chilling tanks being maintained at a temperature of 40° F. or lower throughout the holding period.

(i) Poultry which is to be held in chilling tanks in excess of 24 hours shall at the end of the 24-hour chilling period be removed from the tanks and repacked in clean ice and in clean tanks which are continually drained, or as an alternative, the tanks shall be drained and re-iced and placed in a cooler which will maintain all of the poultry in the tanks at a temperature of 40° F. or below.

(ii) Poultry washing, chilling, and draining practices and procedures shall be such, as will minimize moisture absorption and retention at time of packaging. The inspector will make such weight tests as he deems necessary to assure compliance with this requirement.

(iii) With respect to poultry that is to be consumer packaged or frozen or both, the maximum moisture absorption and retention during the washing, chilling and draining processes shall not exceed at the time of packaging the percentage tolerances set forth in the following table:

Kind and weight of poultry read-to-cook:	*Percentage increase in weight over weight prior to washing*
Turkeys, 20 pounds and over	4½
Turkeys, 10 to 20 pounds	6
Turkeys, Under 10 pounds	8
Chickens, 5 pounds and under	8
All other kinds and weights of poultry	6

(iv) With respect to poultry that is to be ice packed, the maximum amount of moisture that is permitted to be absorbed shall not exceed 12 percent at time of ice packing. The loss of moisture during holding and transportation results in moisture retention that is within the tolerances specified in subdivision (iii) of this subparagraph.

(v) The temperature of the chilling media in poultry chilling equipment shall not exceed 65° F. in the warmest part of the chilling system.

(4) Notwithstanding the foregoing cooling requirements, the Administrator is authorized to specify, under special circumstances, such additional cooling and handling methods as may be necessary to assure wholesome poultry and poultry products.

(c) *Air chilling.* In air chilling, dressed poultry shall be placed in a refrigerated room with moderate air movement at a temperature which will reduce the internal temperature of the carcasses to 40° F. or less within 24 hours. In air chilling ready-to-cook poultry, the internal temperature of the carcasses shall be reduced to 40° F. or less within 16 hours.

(d) *Cooling giblets.* Giblets shall be chilled to 40° F. or lower within two hours from the time they are removed from the inedible viscera, except that when they are cooled with the carcass the requirements of paragraphs (b)(2) and (f)(4) of this section shall apply. Any of the acceptable methods of chilling the poultry carcass may be followed in cooling giblets, except that unwrapped livers shall not be cooled in agitated ice and water chilling media for a period in excess of 20 minutes, but may be cooled in perforated containers which are immersed in noncirculated ice and water chilling media: *Provided*, That the livers are removed from the chilling containers when their temperature has been lowered to 40° F. When ready-to-cook birds are to be consumer packaged, the giblets shall be handled in a manner that will prevent free water from being included in the giblet package. Giblet wrappers shall be made of reasonably nonabsorbent materials and shall be no larger than necessary to properly wrap the giblets.

(e) *Other chilling procedures.* Any other chilling procedure which will effect chilling in a manner equal to that obtained by the procedures herein set forth may be permitted when approved by the Administrator.

(f) *Freezing.* (1) Dressed and ready-to-cook poultry which has been chilled to 40° F. or below prior to packaging and which is to be frozen and so labeled shall be placed into a freezer within 48 hours from time of packaging. If such poultry cannot be immediately placed into the freezer after packaging, it shall be held at 36° F. or lower.

(2) The freezing operation for dressed poultry shall be accomplished in such a manner as to bring the internal temperature of the birds in the center of the package to 0° F. or below within 96 hours from the time of entering the freezer; whereas, ready-to-cook poultry shall be frozen in a manner so as to bring the internal temperature of the birds at the center of the package to 0° F. or below within 72 hours from the time of entering the freezer.

(3) Upon written request, and under such conditions as may be prescribed by the Administrator, dressed and ready-to-cook poultry which is to be frozen immediately may be moved from the official establishment prior to freezing: *Provided*, That the plant and freezer are so located and the necessary arrangements are made so that the Inspection Service will have access to the freezing room and adequate opportunity to determine compliance with the time and temperature requirements specified in subparagraph (2) of this paragraph.

(4) Warm packaged ready-to-cook poultry which is to be chilled by immediate entry into a freezer within the official establishment shall within 2 hours from time of slaughter be placed in a plate freezer or a freezer with a functioning circulating air system where a temperature of −10° F. or lower is maintained.

(5) Frozen poultry shall be held under conditions which will maintain the product in a solidly frozen state with temperature maintained as constant as possible.

(6) Immersion or spray freezing equipment shall be constructed of non-corrosive metal or other acceptable material. Compounds used in immersion or spray freezing procedures shall be approved by the Administrator prior to use.

(7) Except as otherwise provided in § 81.104, freezing facilities shall be provided within the official establishment for frozen poultry products other than ready-to-cook poultry.

(g) *Ice-pack containers.* When poultry is ice packed in barrels or other containers, the barrels and containers shall be covered and shall have an adequate number of drain holes to permit the water to drain out.

However, the Administrator, upon written request and under such conditions as he may prescribe, may approve the shipment of poultry in operational type containers, such as chill tanks or lugs, from one official establishment to another official establishment for further processing.

§ 81.51 *Vermin.* Every practicable precaution shall be taken to exclude flies, rats, mice, and other vermin from the official establishment. Dogs, cats, and other pets shall be excluded from rooms where poultry products and dressed poultry are processed, handled and stored.

§ 81.52 *Use of compounds.* Only germicides, insecticides, rodenticides, detergents, or wetting agents or other similar compounds which will not deleteriously affect the poultry or poultry products and which have been approved by the Administrator may be used in an official establishment. The use of such compounds shall be in a manner satisfactory to the Administrator. Such compounds shall be approved, for the purpose of the Poultry Products Inspection Act only, upon application and in accordance with the following procedure:

(a) The manufacturer or user of the compound or any other interested person shall submit to the Administrator the following data:

(1) The formula of the compound listing each ingredient and the percentage of each ingredient in terms of weight or liquid measure, if the product is a liquid, and in terms of weight, if it is solid or semisolid viscose or a mixture of liquid and solids. The ingredients must be stated in terms of the well-known common names of the ingredients or, if an ingredient has no common name, the correct chemical name. However, in the case of any compound subject to the Federal Insecticide, Fungicide and Rodenticide Act, a statement of the composition of the compound as required for registration under that act shall be submitted in lieu of the data otherwise required by this subparagraph.

(2) A certification that the compound as it is proposed to be used in the official establishment will not deleteriously affect the poultry or poultry products. The certification shall include the conditions under which the particular compound is believed to be satisfactory for use and the precautions necessary, if any, in the use of such compound for the purpose intended in poultry processing establishments.

(b) As a prerequisite for approval, any compound which is required to be registered under the provisions of the Federal Insecticide, Fungicide and Rodenticide Act shall be registered and comply with the provisions of that act. The applicant shall furnish the registration number assigned under the aforesaid act along with two copies of the label being currently used on the product.

(c) A small sample of the compound (4 to 6 ounces) shall be submitted with the request for approval of its use in poultry processing establishments.

(d) The Administrator will either approve or disapprove the use of a particular compound after a careful evaluation of the data submitted pursuant to paragraph (a) of this section and consideration of any other information that is available pertaining to the compound under consideration.

(e) The Inspection Service is authorized to draw samples of any compound used in any official plant and make analyses of such compound to determine if the compound conforms to that originally approved and if it is satisfactory for use in official establishments under this section. Whenever the Administrator has reason to believe that a compound may have a deleterious effect on poultry or poultry products, the approval of the particular compound may be suspended, and in such case the processor shall be given an opportunity to show that the compound does not have such effect. After such opportunity has been afforded to the processor, the Administrator shall make a determination as to the effect of the compound on poultry and poultry products and withdraw or reinstate the approval of the compound accordingly. Use of the compound shall not be permitted during the period of suspension.

(f) Compounds which have been approved prior to January 1, 1959, will not require reapproval on the basis of the procedure set forth in this section but will be subject to the other provisions of this section.

§ 81.53 *Exclusion of diseased persons.* No person affected with any communicable disease (including, but not being limited to, tuberculosis) in a transmissible stage shall be permitted in any room or compartment where exposed or unpacked dressed poultry or poultry products are prepard, processed, or otherwise handled.

INSPECTION PROCEDURES

ANTE MORTEM INSPECTION

§ 81.61 *Ante mortem inspection.* An ante mortem inspection of poultry shall, where and to the extent considered necessary by the Administrator and under such instructions as he may issue from time to time, be made of poultry on the day of slaughter in any official establishment processing poultry for commerce.

§ 81.62 *Facilities for ante mortem inspection.* Batteries, coops, or other facilities in which live poultry is presented for ante mortem inspection shall be of such arrangement, construction, and shall be so placed with sufficient light provided so that the inspector can clearly see the birds to the extent needed to carry out an adequate inspection.

§ 81.63 *Condemnation on ante mortem inspection.* Birds plainly showing on ante mortem inspection any disease or condition, that under §§ 81.79 to 81.91, inclusive, would cause condemnation of their carcasses on post-mortem inspection, shall be condemned. Birds which on ante mortem inspection are condemned shall not be dressed, nor shall they be conveyed into any department of the plant where poultry products are prepared or held. Poultry which has been condemned on ante mortem inspection and has been killed shall, under the supervision of an inspector of the Inspection Service, receive such treatment as that provided in § 81.92.

§ 81.64 *Segregation of suspects on antemortem inspection.* All birds which on antemortem inspection do not plainly show, but are suspected of being affected with any disease or condition that under §§ 81.79 to 81.91, inclusive, may cause condemnation in whole or in part on post-mortem inspection, shall be segregated from the other poultry and held for separate slaughter, evisceration, and post-mortem inspection. The inspector shall be notified when such segregated lots are presented for post-mortem inspection and inspection of such birds shall be conducted separately. Such procedure for the correlation of antemortem and post-mortem findings by the inspector, as may be prescribed or approved by the Administrator, shall be carried out.

§ 81.65 *Quarantine of diseased poultry.* If live poultry, which is affected by any contagious disease which is transmissible to man, is brought into an official establishment, such poultry shall be segregated. The slaughtering of such poultry shall be deferred and the poultry shall be dealt with in one of the following ways:

(a) If it is determined by a veterinary inspector that further handling of the poultry will not create a health hazard, the lot shall be subject to antemortem and post-mortem inspection pursuant to the regulations in this part.

(b) If it is determined by a veterinary inspector that further handling of the poultry will create a health hazard, such poultry may be released for treatment under the control of an appropriate State or Federal agency. If the circumstances are such that release for treatment is impracticable, a careful bird-by-bird ante mortem inspection shall be made, and all birds found to be, or which are suspected of being, affected with the contagious disease transmissible to man shall be condemned.

POST-MORTEM INSPECTION

§ 81.71 *Evisceration.* No viscera or any part thereof shall be removed from any dressed poultry which is to be processed under inspection in any official establishment, except at the time of evisceration and inspection. Each carcass to be eviscerated shall be opened so as to expose the organs and the body cavity for proper examination by the inspector and shall be prepared immediately after inspection as ready-to-cook poultry. If a carcass is frozen, it shall be thoroughly thawed before being opened for examination by the inspector. Each carcass, or all parts comprising such carcass, shall be examined by the inspector. However, the Administrator may, whenever he deems it advisable and under such conditions as he may require to carry out the purposes of the act, authorize the removal, from any carcass or parts thereof, prior to inspection, of any part which will not be used in the preparation of any edible product.

§ 81.72 *Carcasses held for further examination.* Each carcass, including all parts thereof, in which there is any lesion of disease, or other condition which might render such carcass or any part thereof unfit for human food, and with respect to which a final decision cannot be made on first examination by the inspector, shall be held for further examination. The identity of each such carcass, including all parts thereof, shall be maintained until a final examination has been completed.

§ 81.73 *Condemnation of carcasses.* At the time of evisceration under inspection service, each carcass, or any part thereof, which is found to be unsound, unwholesome, or otherwise unfit for human food, shall be condemned.

§ 81.74 *Passing of carcasses.* Each carcass and all parts and organs thereof which are found to be sound, wholesome, unadulterated, and fit for human food, shall be passed.

DISPOSITION OF DISEASED POULTRY CARCASSES AND PARTS

§ 81.79 *General.* The carcasses or parts of carcasses of all poultry inspected at an official establishment and found at the time of post-mortem inspection, or at any subsequent inspection, to be affected with any of the diseases or conditions named in other sections in this part, shall be disposed of in accordance with the section pertaining to the disease or condition. Owing to the fact that it is impracticable to formulate rules for each specific disease or condition and to designate at just what stage a disease process results in an unwholesome product, the decision as to the disposal of all carcasses, parts, or organs not specifically covered by the regulations, or by instructions of the Administrator issued pursuant thereto, shall be left to the inspector in charge, and if the inspector in charge is in doubt concerning the disposition to be made, specimens from such carcasses shall be forwarded to the laboratory for diagnosis.

§ 81.80 *Tuberculosis.* Carcasses of poultry affected with tuberculosis shall be condemned.

§ 81.81 *Diseases of the leukosis complex.* Carcasses of poultry affected with any one or more of the several forms of the avian leukosis complex shall be condemned, except that carcasses affected with the ocular form only may be passed.

§ 81.82 *Septicemia or toxemia.* Carcasses of poultry showing evidence of any septicemic or toxemic disease, or showing evidence of an abnormal physiologic state, shall be condemned.

§ 81.83 *Special diseases.* Carcasses of poultry showing evidence of any disease which is characterized by the presence, in the meat, of organisms or toxins dangerous to the consumer, shall be condemned.

§ 81.84 *Inflammatory processes.* Any organ or part of a carcass which is affected by an inflammatory process shall be condemned and, if there is evidence of general systemic disturbance, the whole carcass shall be condemned.

§ 81.85 *Tumors.* Any organ or part of a carcass which is affected by a tumor shall be condemned and when there is evidence of metastasis or that the general condition of the bird has been affected by the size, position, or nature of the tumor, the whole carcass shall be condemned.

§ 81.86 *Parasites.* Edible organs or parts of carcasses which are found to be infested with parasites, or which show lesions of such infestation shall be condemned and, if the whole carcass is affected, the whole carcass shall be condemned.

§ 81.87 *Bruises.* Any part of a carcass which is badly bruised shall be condemned and, if the whole carcass is affected as a result of the bruise, the whole carcass shall be condemned. Parts of a carcass, which show only slight reddening from a bruise, may be passed for food.

§ 81.88 *Cadavers.* Carcasses of poultry showing evidence of having died from causes other than slaughter shall be condemned.

§ 81.89 *Contamination.*

Carcasses of poultry contaminated by volatile oils, paints, poisons, gases, scald vat water in the air sac system, or other substances which affect the wholesomeness of the carcasses, shall be condemned. Any organ or part of a carcass which has been contaminated following mutilation shall be condemned, and if the whole carcass is affected, the whole carcass shall be condemned.

§ 81.90 *Overscald.* Carcasses of poultry which have been overscalded resulting in a cooked appearance of the flesh shall be condemned.

§ 81.91 *Decomposition.* Carcasses of poultry deleteriously affected by post-mortem changes shall be disposed of as follows:

(a) Carcasses which have reached a state of putrefaction or stinking fermentation shall be condemned.

(b) Any part of a carcass which is green struck shall be condemned and, if the carcass is so extensively affected that removal of affected parts is impracticable, the whole carcass shall be condemned.

(c) Carcasses affected by types of post-mortem change which are superficial in nature may be certified for food after removal and condemnation of affected parts.

§ 81.92 *Disposal of condemned carcasses and parts.* All condemned carcasses, or parts of carcasses, shall be disposed of by one of the following methods, under the supervision of an inspector of the Inspection Service: (Facilities and materials for carrying out the requirements in this section shall be furnished by the official establishment.)

(a) Steam treatment (which shall be accomplished by processing the condemned product in a pressure tank under at least 40 pounds of steam pressure) or thorough cooking in a kettle or vat, and processing for a sufficient time to effectively destroy the product for human food purposes and preclude dissemination of disease through consumption by animals. Tanks and equipment used for this purpose or for rendering or preparing inedible products shall be in rooms or compartments separate from those used for the preparation of edible products. There shall be no direct connection, by means of pipes, or otherwise, between tanks containing inedible products and those containing edible products.

(b) Incineration or complete destruction by burning.

(c) Chemical denaturing, which shall be accomplished by the liberal application to all carcasses and parts thereof, of:

(1) Crude carbolic acid

(2) Kerosene, fuel oil or used crank case oil.

(3) Any phenolic disinfectant conforming to commercial standards CS 70–41 or CS 71–41 which shall be used in at least 2 percent emulsion or solution.

(4) Any other substance that the Administrator approves which will decharacterize the carcasses or parts to the extent necessary to accomplish the purposes of this section.

Reinspection and ingredients

§ 81.95 *Reinspection of poultry products; ingredients.*

(a) Any inspected and passed poultry product m[illegible]e brought into an official establishn[illegible] only if the container of such product is marked for identification in the manner prescribed in § 81.130 and the product is reinspected by an inspector at the time it is brought into such plant. Upon reinspection, if any such product or portion thereof is found to be unsound, unwholesome, adulterated or otherwise unfit for human food, such product, or portion thereof, shall be condemned and shall receive such treatment as that provided in § 81.92.

(b) Any product which is prepared under inspection in an official establishment shall be inspected in such establishment as often as the inspector deems it necessary in order to ascertain whether the product is sound, wholesome, and fit for human food at the time it leaves the establishment. Upon any such inspection, if any product or portion thereof is found to be unsound, unwholesome, or otherwise unfit for human food, such product or portion thereof shall be condemned and shall receive such treatment as that provided in § 81.92.

(c) All substances and ingredients used in the manufacture or preparation of any poultry product shall be clean, sound, wholesome, and fit for human food. **Liquid and frozen egg products used in the preparation of any poultry product shall have been prepared under continuous inspection of the Department.**

§ 81.96 *Retention tags.* An inspector may use such retention tags or other devices and methods as may be approved by the Administrator, for the identification of (a) products which are held for further examination, and (b) any equipment, utensils, rooms, or compartments which are found to be unclean and in violation of any of the regulations. No poultry product, equipment, utensil, room, or compartment so identified shall be released for use until it has been made acceptable. Such identification shall not be removed by anyone other than an inspector.

§ 81.98 *Appeal inspections; how made.* Any person receiving inspection service may, if dissatisfied with any decision of an inspector relating to any inspection, file an appeal from such decision: *Provided,* That such appeal is filed within 48 hours from the time the decision was made. Any such appeal from a decision of an inspector shall be made to his immediate superior having jurisdiction over the subject matter of the appeal. Review of such appeal findings, when requested, shall be made by the immediate superior of the employee of the Department making the appeal inspection. The cost of any such appeal shall be borne by the appellant if the Administrator determines that the appeal is frivolous The charges for such frivolous appeal shall be at the rate of $5.40per hour for the time required to make the appeal inspection.

CANNING REQUIREMENTS

§ 81.100 *Manner in which canned products shall be processed and handled.* Canned poultry products which are heat treated after closing or sealing shall be processed and handled in accordance with the following requirements:

(a) Immediate containers (whether of metal, glass, or other material) shall be cleaned thoroughly by washing in an inverted position with running water of a temperature of at least 180° F., or by other means acceptable to the Administrator, immediately prior to filling with poultry products; and precautions shall be taken to avoid any subsequent soilage of the inner surfaces of such containers.

(b) Only perfect closure is acceptable for hermetically sealed containers; and heat processing of the products in such containers shall follow immediately after closing.

(1) Except as provided in paragraph (e) of this section, such products shall be so processed at such temperature and for such period of time as will insure preservation of the products under usual conditions of storage and transportation.

(2) Immediately after closing, and again after the containers have cooled sufficiently for handling after heat processing, careful examination shall be made by competent plant employees to ascertain whether the containers are perfectly sealed. The poultry products in such containers as are defectively closed or sealed shall, as promptly as practicable, be filled into other containers, hermetically sealed, and heat processed unless the containers are promptly placed in a cooler at a temperature not exceeding 38° F. under conditions that will promptly and effectively chill them. Such chilled containers of products shall be opened and the contents removed and reprocessed immediately after removal from the cooler: *Provided,* That if such containers remained in the cooler for a period of 24 hours or longer, the contents shall be inspected by an inspector prior to the reprocessing thereof. Failure to comply with the provisions of this paragraph shall subject the poultry products to condemnation.

(c) After heat processing, and after the containers have cooled sufficiently for handling, the containers shall be examined by competent plant employees and shall not be passed unless showing the external characteristics of sound containers.

(d) After heat processing, any containers of poultry products showing characteristics of short vacuum or overstuffed containers shall, when an inspector deems it necessary in order to determine whether spoilage of the product has taken place, be incubated under the supervision of an inspector, after which the containers shall be opened and sound products passed for food and spoiled products condemned.

(e) Poultry products may, when authorized by the Administrator, and under such conditions as he may prescribe and approve, be canned without steam-pressure cooking, and such products, if frozen, shall be labeled "keep frozen," and if they are not frozen, they shall be labeled "perishable, keep under refrigeration."

(f) Each lot of canned poultry products shall be identified, during the handling preparatory to heat processing, by tagging the baskets, cases, or containers with a tag which will change color on going through the heat processing or by other effective means which will positively prevent failure to heat process.

(g) Facilities shall be provided to incubate at least representative samples of fully processed canned poultry products. The incubation shall consist of holding the samples for at least 10 days at about 98° F. The extent to which incubation tests shall be required will depend on conditions such as the efficiency of the plant in conducting canning operations, the kind of equipment used, and the degree of efficiency at which such equipment is maintained.

(1) In the event the official establishment fails to provide suitable facilities for incubation of test samples of any lot of fully processed canned poultry products, the inspector in charge may require holding of the entire lot under such conditions and for such period of time as will, in his discretion, be necessary to ascertain the stability of the product.

(2) The inspector in charge may, prior to completion of any required incubation of a representative sample, permit lots of fully processed canned poultry products to be shipped from the official plant when he has no reason to suspect unsoundness of such products; however, such shipments shall be made under circumstances which will assure the return of the products to the plant for reinspection should such action be indicated by the incubation results.

(h) All canned products shall be plainly and permanently marked, by code or otherwise, on the containers, with the identity of the contents and date of canning, except that canned products packed in glass containers are not required to be marked with the date of canning if such information appears on the shipping container. If the marking is by code, its meaning shall be furnished to the inspector in charge.

FROZEN FOODS

§ 81.104 *Processing requirements.* Processing procedures with respect to frozen ready-to-heat-and-eat poultry products or stuffed ready-to-roast poultry shall be in accordance with sound operating practices and carried out in a manner which will assure wholesomeness of the products. Products to be frozen shall be moved into the freezer promptly under such supervision as will assure preservation of the products by prompt and efficient freezing. Adequate freezing facilities shall be provided within the official establishment where products to be frozen are prepared, except that, upon written request, and under such conditions as may be prescribed by the Administrator, such products may be moved from the official establishment prior to freezing: *Provided,* That the official establishment and freezer are so located and the necessary arrangements are made so that the Inspection Service will have access to the freezing room and adequate opportunity to determine that the products are being properly handled and frozen.

POULTRY PRODUCTS CONTAMINATED BY POLLUTED WATER

§ 81.107 *Procedure for handling.* (a) In the event there is polluted water (including, but not being limited to, flood water) in an official establishment, all poultry and poultry products and ingredients used in the preparation of such products that have been or may have been contaminated by the water shall be condemned.

(b) After the polluted water has receded, all walls, ceilings, posts and floors of the rooms and compartments involved, including the equipment therein, shall, under the supervision of an inspector, be cleaned thoroughly. An adequate supply of hot water, under pressure, is essential for effective cleaning. After cleansing, a solution of sodium hypochlorite containing approximately ½ of 1 per cent of available chlorine (5,000 parts per million), or other disinfectant approved by the Administrator, shall be applied; and all metal surfaces shall be rinsed thoroughly with water to prevent corrosion. Any equipment that will afterwards be used in connection with any poultry product shall be rinsed thoroughly with clean water before being used.

(c) Hermetically sealed containers of poultry products which have been submerged in, or otherwise contaminated by, the polluted water shall be rehandled promptly under supervision of an inspector as follows:

(1) Such containers as are swollen or leaky or otherwise do not show the external characteristics of sound containers shall be segregated and the contents thereof condemned.

(2) Any labels, attached or affixed to the remaining containers shall be removed and the containers washed in warm soapy water; and, if necessary to remove rust and other foreign material, a brush shall be used.

(3) Thereafter, such containers shall be immersed in a solution of sodium hypochlorite containing not less than 100 parts per million of available chlorine, or other disinfectant approved specifically for this purpose by the Administrator and rinsed in clean fresh water and dried thoroughly. Any such containers which show extensive rusting or corrosion, such as might materially weaken the container, shall be opened under the supervision of an inspector. The poultry products from such containers that are found by the inspector to be sound and wholesome shall be passed for human food.

(4) The remaining containers may be relacquered, if necessary, and then relabeled with approved labels applicable to the poultry products therein.

(5) The identity of the canned poultry products shall be maintained throughout all stages of the rehandling operation to insure correct labeling of the containers.

PREPARATION OF ARTICLES OTHER THAN FOR HUMAN FOOD

§ 81.110 *Preparation of animal food or other articles in an official establishment*—(a) *Requirements applicable when prepared in an edible products department.* When an article (including, but not being limited to, animal food) that is not for use as human food is prepared in any room or compartment in an official establishment where poultry products are prepared or handled (such room or compartment being herein referred to as "edible products departments"), sufficient space and equipment shall be provided to assure that the preparation of the article in no way interferes with the preparation or handling of the poultry products. Where necessary, separate equipment shall be provided for the preparation of the article. To assure the maintenance of the requisite sanitary conditions in the edible products department, the operations incident to the preparation of the article shall be subject to the same sanitary requirements as apply to the edible products department. Preparation of the article shall be limited to those hours during which the official establishment operates under the supervision of an inspector. The ingredients used in the preparation of the article shall, unless otherwise approved by the Administrator, be such as may be used in the preparation of a poultry product. The article may be stored in, and distributed from, the edible products department if the article is properly identified.

(b) *Requirements applicable when prepared in an inedible products department.* When any article (including, but not being limited to, animal food) that is not for use as human food, is prepared in any part of an official establishment other than an edible products department (such part of the establishment being herein referred to as "inedible products department"), the area in which such article is prepared shall be distinctly separated from all edible products departments. Poultry products and inedible products may be brought from any edible products department into any inedible products department, but no poultry product or inedible product from an inedible products department may be brought into an edible products department except under such conditions as may be prescribed or approved by the Administrator. Any such articles as are in sealed containers or are handled in the manner prescribed or approved by the Administrator may be brought into an edible products department. Diseased carcasses or diseased parts of any carcass shall not be used in the preparation of any animal food unless it has been treated in the manner prescribed in § 81.92 (a). Trucks or containers used for the transportation of poultry products or inedible products into an inedible products department shall be cleaned before being returned to or brought into an edible products department. Sufficient space shall be allotted and adequate equipment and facilities provided so that the preparation of the article does not interfere with the preparation of poultry products in the plant or the maintenance of the requisite sanitary conditions in the official establishment. The preparation of any article shall be subject to supervision by an inspector.

(c) *Containers to be labeled.* The immediate container of any such article that is prepared in an official establishment shall be conspicuously labeled so as to distinguish it from human food.

REPORTS

§ 81.113 *Report of inspection work.* Reports of the inspection work carried on within official establishments shall be forwarded to the Administrator by the inspector in such a manner as may be specified by the Administrator.

§ 81.114 *Information to be furnished to inspectors.* When inspection service is performed within an official establishment, the applicant for such inspection service shall furnish the inspector rendering such service such information and assistance as may be required for the purpose of preparing certificates, reports, and the performance of other official duties.

§ 81.115 *Reports of violations.* Each inspector, agent, representative, or employee of the Inspection Service shall report, in the manner prescribed by the Administrator, all violations of the Poultry Products Inspection Act and noncompliance with the regulations in this part of which he has knowledge.

CERTIFICATES

§ 81.118 *Export certificates; issuance and disposition.* (a) Upon the request of an exporter, any inspector is authorized to issue an export certificate with respect to the shipment to any foreign country of any inspected and passed poultry product, or of any poultry slaughtered in an official establishment, after suitable examination of the product has been made by the inspector.

(b) Each export certificate shall be issued in quadruplicate; the original and duplicate shall be delivered to the shipper who requested such certificate, and the duplicate shall be delivered by him to the agent of the railroad or other carrier transporting such product from the United States otherwise than by water, or to the Chief Officer of the vessel on which the export shipment is made. The triplicate copy of such export certificate shall be filed in the office of the Area Supervisor serving the area in which such export certificate was issued. The quadruplicate copy shall be retained by the inspector for filing. The inspector issuing an export certificate is authorized to furnish additional copies of such certificate upon the request of an interested party.

§ 81.119 *Form of export certificates.* Each export certificate issued pursuant to the regulations in this part shall be approved by the Administrator as to form and shall show the respective names of the exporter and the consignee, the destination, the shipping marks, the names of such products, the total net weight thereof, and such other information as the Administrator may prescribe or approve.

§ 81.120 Special procedure or requirements as to certification of slaughtered poultry for export to certain countries.

When export certificates are required by any foreign country for slaughtered poultry exported to such country, the Administrator shall prescribe or approve the form of export certificate to be used and the methods and procedures as he deems appropriate with respect to the preparation and transportation of such poultry, in order to comply with requirements specified by the foreign country regarding the exported products.

§ 81.121 *Poultry inspection certificates; issuance and disposition.* (a) Upon the request of an interested party, any veterinary inspector is authorized to issue a poultry inspection certificate with respect to any lot of dressed poultry inspected by him. Each certificate shall be signed by the inspector who made the inspection covered by the certificate, and if more than one inspector participated in the inspection of the lot of poultry, each such inspector shall sign the certificate with respect to such lot. If the inspection of a lot covered by a certificate was made by a lay inspector, such certificate shall also be signed by the station supervisor or by the inspector in charge of the substation when such inspection was made. Any inspector is authorized to issue a poultry inspection certificate with respect to any poultry product inspected by him.

(b) The original and one copy of each poultry inspection certificate shall be issued to the applicant who requested such certificate, one copy shall be forwarded to the Area Supervisor, and one copy shall be retained by the inspector for filing. The inspector who issues any inspection certificate is authorized to furnish an additional copy of such certificate upon the request of an interested party.

§ 81.122 *Form of poultry inspection certificate.* Each poultry inspection certificate issued pursuant to the regulations in this part shall be approved by the Administrator as to form, and shall show the names of the poultry products covered by such certificate, the quantity of each such product, such shipping marks as are necessary to identify such products, and all pertinent information concerning the wholesomeness thereof.

§ 81.123 *No erasures or alterations to be made on certificates.* No erasures or alterations shall be permitted on a certificate. All certificates rendered useless through clerical error or otherwise and all certificates cancelled for whatever cause shall be voided, initialed, and one copy shall be retained in the inspector's file; and the original and balance of the copies shall be forwarded to the Area Supervisor.

§ 81.124 *Data to be entered in proper spaces.* All certificates shall be so executed that the data entered thereon will appear in the proper spaces on each copy of the certificate.

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LABELING

§ 81.125 *Containers of poultry required to be labeled.* Except as may be authorized by the Administrator with respect to shipment of products between official establishments, each shipping container and each immediate container of any product shall at the time it leaves the official establishment bear approved labels containing information in accordance with the provisions set forth in §§ 81.126 to 81.146, inclusive, and the act.

§ 81.126 *Preparation of marking devices bearing the official inspection mark without advance approval prohibited; exception.* Except for the purposes of preparing and submitting a sample or samples of marking devices, or imprints prepared therefrom, to the Administrator for approval, no person shall procure, make, or prepare, or cause to be procured, made, or prepared, any stencil, or other marking device bearing official identification or any abbreviation, copy or representation thereof, for use on any product without the written authority therefor of the Administrator. However, when any sample stencil, or other marking device or an imprint prepared therefrom is approved by the Administrator for a particular applicant, additional supplies of such stencil, or other marking device of a character identical to such approved sample may be procured, made, or prepared by such applicant, for use in accordance with the regulations, without further approval by the Administrator.

§ 81.127 *Labels to be approved by the Administrator.* No label, except printer's proofs bearing official identification shall be printed until the printer's proof or a photostatic copy has been found by the Administrator to be acceptable; and no label or imprint bearing official identification shall be used until finished copies or samples thereof have been approved by the Administrator, except that approval may be given to printer's final proofs or photostatic copies of labels or samples of stenciled and rubber stamped imprints for shipping containers or containers for institutional packs, and no such labels or imprints shall be used until such proofs or copies have been approved by the Administrator.

§ 81.128 *Unauthorized use or disposition of approved labels.* Labels or imprints approved for use pursuant to §§ 81.126 and 81.127 shall be used only for the purpose for which approved, and shall not be disposed of from the plant for which approved except with written approval of the Administrator. Any unauthorized use or disposition of approved labels or labels bearing official identification may result in cancellation of the approval.

§ 81.129 *Wording and form of the inspection mark.* Except as otherwise authorized, the inspection mark required to be used with respect to inspected poultry products shall include wording as follows: "Inspected for wholesomeness by U. S. Department of Agriculture." This wording shall be contained within a circle. The form and arrangement of such wording shall be exactly as indicated in the example in Figure 1, except that the appropriate plant number shall be shown, and if the plant number appears elsewhere on the labeling material in the manner prescribed in § 81.130 (a) (6), it may be omitted from the inspection mark. The Administrator may approve the use of abbreviations of such inspection mark; and such approved abbreviations shall have the same force and effect as the inspection mark.

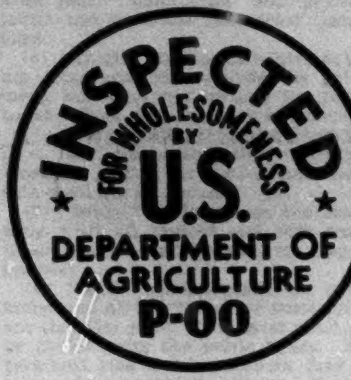

FIGURE 1.

The inspection mark, or the approved abbreviation thereof, shall be printed on consumer packages, or on a label to be securely affixed to such packages. The inspection mark, or approved abbreviation thereof, shall be applied to shipping containers and may be printed or stenciled thereon, but shall not be applied by rubber stamping.

§ 81.130 *Wording on labels.* (a) Each label approved for use on an immediate container for poultry products shall bear in distinctly legible form the following information:

(1) The common or usual name of the poultry product.

(2) A statement of ingredients if fabricated from two or more ingredients, including a declaration as to artificial flavors, colors, or preservatives, if any. Such ingredients shall be listed by their common or usual names in the order of their descending proportions. For the purpose of this paragraph, the term "chicken meat," unless modified by an appropriate adjective, is construed to mean deboned white and dark meat; whereas, the term "chicken" may include other edible parts such as skin and fat not in excess of their natural proportions, in addition to the chicken meat. If the term "chicken meat" is listed and the product also contains skin, giblets, or fat, it is necessary to list each such ingredient. This terminology shall apply to poultry products prepared from other kinds of poultry where applicable.

(3) The net weight or other appropriate measure of the contents, except that the Administrator may approve the use of labels for certain types of immediate containers which do not bear the net weight: *Provided*, That the retailer or distributor supplying the retailer agrees in writing to the Administrator to mark the true net weight on the label prior to display and sale thereof: *And provided further*, That the shipping container bears a statement "Net weight to be marked on consumer packages prior to display and sale": *And provided further*, That the total net weight of the contents of the shipping container shall be marked on such container. The net weight marked on immediate containers of poultry products shall be the net weight of the poultry and shall not include the weights of the wet or dry packaging materials and giblet wrapping materials.

(4) The name and address of the packer or distributor and when the name of the distributor is shown, it shall be qualified by such term as "packed for," "distributed by," or "distributors."

(5) The official inspection mark.

(6) The plant number of the official establishment in which the product was inspected, either within the official inspection mark or clearly visible and in close proximity elsewhere on the exterior of the container, or in the case of canned product, the plant number may be embossed on the lid of each can. In the case of nontransparent consumer packages such as cartons, the plant number may be legibly printed thereon or it may be shown on an insert label placed on top of the product within the package. In the case of transparent wrappers, the plant number may be shown on an insert label and so placed under the transparent covering that it will be clearly visible and legible.

(b) Each label approved for use on a shipping container shall bear in distinctly legible form the following information:

(1) The official inspection mark.

(2) The plant number of the official establishment in which the product was inspected, either within the official inspection mark, or elsewhere on the container clearly visible and in close proximity to the official inspection mark.

(c) Any label which bears the official inspection mark or any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of the regulations shall not bear any statement that is false or misleading. If the Administrator has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Administrator may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Administrator, he may request a hearing, but the use of the label shall, if the Administrator so directs, be withheld pending hearing and final determination by the Administrator. Any person so denied the approval of any label shall be notified promptly of the reasons for the denial. A written application for a hearing with respect to the denial may be filed by said person with the Administrator within 10 days after notice of the denial. Such petition shall state specifically the errors alleged to have been made by the Administrator in denying approval of the label. After consideration of the facts adduced at the hearing, any determination with respect to the matter by the Administrator shall be conclusive unless, within 30 days after the receipt of notice of such final determination, the person adversely affected thereby appeals to the United States Court of Appeals for the Circuit in which he has his principal place of business, or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 204 of the Packers and Stockyards Act of 1921, as amended, shall be applicable to appeals taken under this section.

§ 81.131 *False or deceptive terms or devices; and other labeling requirements.* (a) No product, and no container thereof, shall be labeled with any false or deceptive name, but established trade names which are usual to such articles and are not false or deceptive and which have been approved by the Administrator may be used.

(b) No statement, word, picture, design, or device, which is false or misleading in any particular or conveys any false impression or gives any false indication of origin, identity, or quality, shall appear on any label. For example:

(1) Official grade designations such as the letter grades A, B, and C may be used in labeling individual carcasses of poultry and consumer packages of poultry and poultry products only if such poultry has been graded by a licensed grader of the Federal or Federal-State poultry grading service.

(2) Terms having geographical significance with reference to a particular locality may be used only when the product was produced in that locality.

(3) Terms, such as "baby," may be used to indicate immaturity of poultry which is marketed earlier than the usual marketing age: *Provided*, That such terms are printed in a style and size of type no larger than is used to indicate the name of the product.

(c) Poultry products which have been treated with compounds to retard spoilage shall be labeled to indicate such treatment.

(d) The terminology specified in subparagraphs (1) through (10) of this paragraph are applicable to parts of poultry cut in the manner described therein.

(1) "Breasts" shall be separated from the back at the shoulder joint and by a cut running backward and downward from that point along the junction of the vertebral and sternal ribs. The ribs may be removed from the breasts, and the breasts may be cut along the breast bone to make two approximately equal halves; or the wishbone portion, as described in subparagraph (3) of this paragraph, may be removed before cutting the remainder along the breast bone to make three parts. Pieces cut in this manner may be substituted for lighter or heavier pieces for exact weight-making purposes and the package may contain two or more of such parts without affecting the appropriateness of the labeling as "chicken breasts." Neck skin shall not be included with the breasts.

(2) *Breasts with ribs* shall be separated from the back at the junction of the vertebral ribs and back. Breasts with ribs may be cut along the breast bone to make two approximately equal halves; or the wishbone portion, as described in subparagraph (3) of this paragraph, may be removed before cutting the remainder along the breast bone to make three parts. Pieces cut in this manner may be substituted for lighter or heavier pieces for exact weight-making purposes and the package may contain two or more of such parts without affecting the appropriateness of the labeling as "breasts with ribs." Neck skin shall not be included.

(3) "Wishbones" (Pulley Bones), with covering muscle and skin tissue, shall be severed from the breast approximately halfway between the end of the wishbone (hypocledium) and front point of the breast bone (cranial process of the sternal crest) to a point where the wishbone joins the shoulder. Neck skin shall not be included with the wishbone.

(4) "Drumsticks" shall be separated from the thigh by a cut through the knee joint (femorotibial and patellar joint) and from the hock joint (tarsal joint).

(5) "Thighs" shall be disjointed at the hip joint and may include the pelvic meat, but shall not include the pelvic bones. Back skin shall not be included.

(6) "Legs" shall include the whole leg, i. e., the thigh and the drumstick, whether jointed or disjointed. Back skin shall not be included.

(7) "Wings" shall include the entire wing with all muscle and skin tissue intact, except that the wing tip may be removed.

(8) "Backs" shall include the pelvic bones and all the vertebrae posterior to the shoulder joint. The meat shall not be peeled from the pelvic bones. The vertebral ribs and/or scapula may be removed or included without affecting the appropriateness of the title. Skin shall be substantially intact.

(9) "Stripped backs" shall include the vertebrae from the shoulder joint to the tail, and include the pelvic bones. The meat may be stripped off of the pelvic bones.

(10) "Necks", with or without neck skin, shall be separated from the carcass at the shoulder joint.

(11) Parts of poultry may be cut in any manner the processor desires as long as the labeling appropriately reflects the contents of the container of such poultry.

(e) The name of the product required to be shown on labels for fresh or frozen raw whole carcasses of poultry shall be in either of the following forms: The name of the kind (such as chicken, turkey, or duck) preceded by the qualifying term "young" or "mature" or "old", whichever is appropriate; or the appropriate class name as described in paragraph (f) of this section. The name of the kind may be used in addition to the class name, but the name of the kind alone without the qualifying age or class term is not acceptable as the name of the product. The class name may be appropriately modified by changing the word form such as using the term "roasting chicken", rather than "roaster". The name "chicken" may be used without qualification with respect to a ready-to-cook pack of fresh or frozen cut-up young chickens, or a half of a young chicken, and the name "duckling" may be used without qualification with respect to a ready-to-cook pack of fresh or frozen young ducks. The appropriate names for cut-up parts are set forth in paragraph (d) of this section. When naming parts cut from young poultry, the identity of both the kind of poultry and the name of the part shall be included in the product name. The product name for parts or portions cut from mature poultry shall include, along with the part or portion name, the class name or the qualifying term "mature". The name of the product for cooked or heat processed poultry products shall include the kind name of the poultry from which the product was prepared.

(f) The appropriate class names for the various kinds of poultry are as follows:

(1) *Chickens*—(i) *Rock Cornish game hen or Cornish game hen.* A Rock Cornish game hen or Cornish game hen is a young immature chicken (usually 5 to 6 weeks of age) weighing not more than 2 pounds ready-to-cook weight, which was prepared from a Cornish chicken or the progeny of a Cornish chicken crossed with another breed of chicken.

(ii) *Broiler or fryer.* A broiler or fryer is a young chicken (usually 9 to 12 weeks of age), of either sex, that is tender-meated with soft, pliable, smooth-textured skin and flexible breastbone cartilage.

(iii) *Roaster.* A roaster is a young chicken (usually 3 to 5 months of age), of either sex, that is tender-meated with soft, pliable, smooth-textured skin and breastbone cartilage that may be somewhat less flexible than that of a broiler or fryer.

(iv) *Capon.* A capon is a surgically unsexed male chicken (usually under 8 months of age) that is tender-meated with soft, pliable, smooth-textured skin.

(vi) *Stag.* A stag is a male chicken (usually under 10 months of age) with coarse skin, somewhat toughened and darkened flesh, and considerable hardening of the breastbone cartilage. Stags show a condition of fleshing and a degree of maturity intermediate between that of a roaster and a cock or old rooster.

(vii) *Hen or stewing chicken or fowl.* A hen or stewing chicken or fowl is a mature female chicken (usually more than 10 months of age) with meat less tender than that of a roaster, and nonflexible breastbone tip.

(viii) *Cock or rooster.* A cock or rooster is a mature male chicken with coarse skin, toughened and darkened meat, and hardened breastbone tip.

(2) *Turkeys*—(i) *Fryer-roaster turkey.* A fryer-roaster turkey is a young immature turkey (usually under 16 weeks of age), of either sex, that is tender-meated with soft, pliable, smooth-textured skin, and flexible breastbone cartilage.

(ii) *Young hen turkey.* A young hen turkey is a young female turkey (usually 5 to 7 months of age) that is tender-meated with soft, pliable, smooth-textured skin, and breastbone cartilage that is somewhat less flexible than in a fryer-roaster turkey.

(iii) *Young tom turkey.* A young tom turkey is a young male turkey (usually 5 to 7 months of age), that is tender-meated with soft, pliable, smooth-textured skin, and breastbone cartilage that is somewhat less flexible than in a fryer-roaster turkey.

(iv) *Yearling hen turkey.* A yearling hen turkey is a fully matured female turkey (usually under 15 months of age) that is reasonably tender-meated and with reasonably smooth-textured skin.

(v) *Yearling tom turkey.* A yearling tom turkey is a fully matured male turkey (usually under 15 months of age) that is reasonably tender-meated and with reasonably smooth-textured skin.

(vi) *Mature turkey or old turkey (hen or tom)*. A mature or old turkey is an old turkey of either sex (usually in excess of 15 months of age) with coarse skin and toughened flesh.

(3) *Ducks*—(i) *Broiler duckling or fryer duckling.* A broiler duckling or fryer duckling is a young duck (usually under 8 weeks of age), of either sex, that is tender-meated and has a soft bill and soft windpipe.

(ii) *Roaster duckling.* A roaster duckling is a young duck (usually under 16 weeks of age), of either sex, that is tender-meated and has a bill that is not completely hardened and a windpipe that is easily dented.

(iii) *Mature duck or old duck.* A mature duck or an old duck is a duck (usually over 6 months of age), of either sex, with toughened flesh, hardened bill, and hardened windpipe.

(4) *Geese*—(i) *Young goose.* A young goose may be of either sex, is tender-meated, and has a windpipe that is easily dented.

(ii) *Mature goose or old goose.* A mature goose or old goose may be of either sex and has toughened flesh and hardened windpipe.

(5) *Guineas*—(i) *Young guinea.* A young guinea may be of either sex, is tender-meated, and has a flexible breastbone cartilage.

(ii) *Mature guinea or old guinea.* A mature guinea or an old guinea may be of either sex, has toughened flesh, and a hardened breastbone.

§ 81.132 *Formulas required.* Copies of each label submitted for approval shall, when the Administrator requires, be accompanied by a statement showing the kinds and percentages of the ingredients by their common or usual names comprising the poultry product and by a statement indicating the method of preparation of the product with respect to which the label is to be used. Approximate percentages may be given in cases where the percentages of ingredients may vary from time to time, if the limits of variation are stated.

§ 81.133 *Wording permitted on food products containing poultry products.* Any label which is to be affixed to a container of any food product containing poultry product which is packed under the supervision of an inspector in any official establishment may bear the phrase: "The poultry product contained herein has been inspected at an establishment where Federal inspection is maintained." Each such trade label shall also be subject to the applicable provisions of §§ 81.126 and 81.127. Such food products containing poultry products or any container thereof shall not bear the official inspection mark, or any abbreviation or representation thereof.

§ 81.134 *Product specifications for labeling purposes.* The Administrator is authorized to establish specifications covering the principal constituents of any poultry food product with respect to which a specified name of the product or other labeling terminology may be used.

(a) *Meat content of poultry pies.* Poultry pies, or pot pies, which are prepared from cooked meat shall contain a minimum of 14 percent (1⅛ ounces per 8-ounce pie) of cooked deboned poultry meat. Poultry pies, or pot pies, prepared with raw meat shall contain a minimum of 25 percent (2 ounces per 8-ounce pie) of raw deboned poultry meat. Both percentages shall be exclusive of any skin, giblets, or fat which may be included in the product.

(b) *Canned boned chicken or turkey.* Canned boned chicken or turkey which is prepared from cooked deboned meat shall not contain more than 10 percent added moisture. The product shall consist of deboned white and dark meat in natural proportions and may contain skin and fat not in excess of natural proportions.

(1) Canned boned poultry meat which is prepared from raw boned meat in combination with cooked boned meat may have moisture added not to exceed 10 percent of the weight of cooked meat used in the product.

(2) Boned chicken or turkey prepared from raw boned meat shall have no moisture added during the preparation and canning processes.

(3) If moisture is added in excess of amounts specified in this paragraph, the ingredient statement on the label shall contain a statement indicating the addition of moisture, and the name of the product shall be qualified to indicate the added moisture.

§ 81.135 *Labels in foreign languages.* Any label to be affixed to a container of any dressed poultry or poultry product for foreign commerce may be printed in a foreign language. However, the official identification shall appear on the label in English, but in addition, may be literally translated into such foreign language. Each such label shall be subject to the applicable provisions of §§ 81.126 to 81.130, inclusive. Deviations from the form of labeling required under the regulations in this part may be approved by the Administrator: *Provided,* (a) That the proposed labeling accords to the specifications of the foreign purchaser, (b) that it is not in conflict with the laws of the country to which it is intended for export, and (c) that the outside of the shipping container is labeled to show that it is intended for export; but if such product is sold or offered for sale in domestic commerce, all the requirements of the regulations in this part shall apply.

§ 81.136 *Wording and form of the dressed poultry identification mark.* The dressed poultry identification mark required by § 81.137 (a) to be used with respect to dressed poultry which is shipped from an official establishment shall include wording as follows: "Dressed Poultry—Eligible for Further Processing in Official Establishments under USDA Inspection." Such labels shall also set forth the applicable plant number and shall be marked with a lot number which shall be the number of the day of the year the poultry was slaughtered or a coded number, the meaning of which shall be made known to the Inspection Service. This wording shall be contained within a rectangle not less than 1½'' x 3'' in size. The form and arrangement of such wording shall be as indicated in the example in Figure 2.

DRESSED POULTRY

ELIGIBLE FOR FURTHER PROCESSING

In Official Establishments Under
USDA Inspection

Plant No. 000. Lot 000

FIGURE 2.

§ 81.137 *Labeling of dressed poultry*—(a) *Wording on labels for dressed poultry.* The provisions of § 81.127 shall apply to labels for dressed poultry to be shipped in commerce or to another official establishment, except that the dressed poultry identification mark shall be shown, but the official inspection mark shall not be shown on such labels.

(b) *Approval of labels for dressed poultry.* Any label which bears the dressed poultry identification mark shall be subject to the provisions of §§ 81.126 to 81.128. Only labels which have been approved by the Administrator may be used on containers for dressed poultry which is to be shipped in foreign commerce or to another official establishment.

§ 81.138 *Evidence of label approval.* No inspector shall authorize the use of official identification for any inspected product unless he has on file evidence that such official identification or packaging material bearing such official identification has been approved in accordance with the provisions of § 81.127.

§ 81.139 *Modifications of approved labels.* (a) The inspector in charge may permit the use of approved labels or other markings which have been modified as follows: *Provided,* That the labeling or marking as modified is so used as not to be false or deceptive:

(1) All features of the label or marking are proportionately enlarged, with color scheme changes, if any, limited to those which will result in the same degree of legibility of each part of the modified label or marking as that of the approved label or marking.

(2) Changes in the figures denoting the quantity of contents or when there is substitution of such abbreviations as "lb." for "pound," "oz." for "ounce," or the "pound" or "ounce" is substituted for the abbreviation.

(3) The name and address of the distributor have been included in the blank space following the words "prepared for" or a similar statement, on a master or stock label which was approved with the understanding that such information would be added later.

(4) Addition during Christmas and other holiday seasons of wrappers or overprints in floral or foliage designs, or illustrations (rabbits, chicks, fire works, or other emblematic holiday designs to approved labels or markings. The use of such designs shall not obscure any mandatory information.

(5) A slight change in arrangement of directions pertaining to the opening of cans or the serving of the product.

(6) The appropriate name or class of the poultry has been added to a master or stock label which was approved without this information appearing on the label.

(b) The inspector in charge shall send a copy of all such modified labels to the Chief of the Inspection Branch.

§ 81.140 *Approvals made by inspectors in charge.* The inspector in charge may approve labels for containers of product sold under a contract specification to governmental agencies when such product is not offered for resale to the general public: *Provided*, That the contract specifications include complete specific requirements with respect to labeling, and are made available to the inspector in charge.

§ 81.141 *Affixing of official identification.* No official identification or any abbreviation, copy or representation thereof may be affixed to or placed on or caused to be affixed to or placed on any product or container thereof except by an inspector or under the supervision of an inspector or other person authorized by the Administrator. All such products shall have been inspected as required by the regulations in this part.

§ 81.142 *Removal of official identification.* Official establishments which receive dressed poultry or ready-to-cook poultry in containers which bear official identification shall remove or deface such identification upon removal of such poultry from the containers.

§ 81.143 *Packaging.* No container which bears or may bear an inspection mark or any abbreviation or copy or representation thereof may be filled in whole or in part except with poultry products which were inspected and passed and are, at the time of such filling, sound, wholesome and fit for human food. All such filling of containers shall be under the supervision of an inspector.

§ 81.144 *Relabeling product.* When it is claimed by an official establishment that some of its labeled poultry product, which has been transported to a location other than an official establishment, is in need of relabeling on account of the labels having become mutilated or damaged, or for some other reason needs relabeling, the requests for relabeling the poultry product shall be sent to the Administrator and accompanied with a statement of the reasons therefor and the number of labels required. Labeling material intended for relabeling inspected and passed product shall not be transported from an official establishment until permission has been received from the Administrator. The relabeling of inspected and passed product with official labels shall be done under the supervision of an inspector. The establishment shall reimburse the Inspection Service for any cost involved in supervising the relabeling of such product.

§ 81.145 *Rescindment of label approvals.* Once a year, or more often if necessary, each official establishment shall submit to the Administrator a list in triplicate of approved labels that have become obsolete, accompanied with a statement that such labels are no longer desired. The labels shall be identified by the date of approval, and the name of product or other designation showing the class of material.

§ 81.146 *Use of previously approved labels.* Any supply of labels on hand at the time of inauguration of service under the regulations in this part, which were approved under the regulations issued pursuant to the Agricultural Marketing Act of 1946, as amended, may be used until the supply is exhausted: *Provided, however,* That such labels are not in conflict with the act. Such previously approved labels shall not be used after July 1, 1960. At the time of inauguration of service under the act an inventory of such previously approved labels shall be furnished to the Inspection Service.

§ 81.147 Products of poultry not intended for human food or intended for export for processing as human food.

Products of poultry that are not intended for use as human food may, after they have been denatured by an approved substance and procedure, be shipped from the official establishment and in commerce even though they do not comply with all the provisions of the regulations applicable to poultry products. However with respect to such items as poultry heads, feet, or parts which are inedible due to causes other than disease, it is not required that these items be denatured if they are mixed with the offal prepared for animal food and marked as such or marked "Not fit for human food." Moreover, feet and heads which are kept separate from the offal and which have not been prepared as poultry products may be shipped from the official establishment and in commerce if they are marked "Not fit for human food" or if they are intended for export for further processing as human food and have been examined and found suitable for such purpose and are marked in a manner approved by the Administrator. The containers of all such aforesaid products shall bear the name and address of the packer and the plant number of the plant where packed and shall not bear the official inspection mark.

§ 81.148 *Labeling of poultry products at retail stores.* Retailers who handle only inspected poultry products may use placards or labels in conjunction with the display of inspected poultry products to indicate that they have been inspected by the Department. Such labels shall be submitted to the Administrator for approval prior to their printing and use. Retailers using such labels shall furnish proof, upon the request of an authorized representative of the Department, that the poultry products so labeled are in fact inspected products. This section shall not be construed to allow any person to falsely make, issue, alter, forge, simulate or counterfeit any official inspection identifications, and official inspection identifications shall not be applied to any products except at official establishments under this part or Part 70 of this chapter.

SHIPMENT OF PRODUCTS IN COMMERCE

§ 81.151 *Violation of the Poultry Products Inspection Act.* It is a misdemeanor, punishable by fine and imprisonment, for any person to violate the provisions of sections 9, 10, 11 or 17 of the Poultry Products Inspection Act. Poultry Regulatory Inspectors shall be appointed and assigned to the Inspection Service to investigate complaints, irregularities, and apparent and alleged violations of the Poultry Products Inspection Act, and of the regulations, and to report their findings in the manner prescribed or approved by the Administrator.

§ 81.152 *Records of interstate transactions.* Persons engaged in the business of processing, transporting, shipping, or receiving poultry slaughtered for human consumption or poultry products in commerce, or holding such products so received, shall maintain complete, accurate, and legible records of such transactions as hereinafter provided, and shall, upon the request of a duly authorized representative of the Secretary, permit him at reasonable times to have access to and to copy all such records.

(a) *Forms of records.* Where a person maintains, subject to inspection, copies of bills of lading, shipping invoices, warehouse receipts, or similar documents which give the information required in this section additional records are not required to be kept by this section.

(b) *Processors.* Processors shall keep copies of bills of sale, or the initial bills of lading or other shipping papers, which give the name or description of products sold, shipped, or received in commerce, net weight, number of shipping containers, name and address of the buyer (if known), name and address of the consignee or receiver (if different than the buyer), if known, address at the destination, method of shipment, and name of the carrier.

(c) *Transportation agencies.* Transportation agencies shall maintain records showing the name or description of the products transported in commerce, weight (indicating net or gross), number of shipping containers, date of receipt, name and address of shipper, name and address of consignee, date of arrival at destination, and name of the person accepting products for consignee. When more than one transportation agency is used for any shipment, each such agency shall maintain such records, to the extent it is concerned.

(d) *Public warehouse or storage companies.* Public warehouse or storage companies shall maintain records showing the name or description of products shipped or received in commerce, name and address of the owner, date of arrival, weight (indicating net or gross), number of shipping containers, name of carrier delivering products to the warehouse or storage point, name of carrier picking up products at warehous or storage point for delivery, date of shipment, and name and address of consignee or receiver.

(e) *Wholesalers, jobbers, or other distributors of poultry or poultry products for resale.* Persons such as wholesalers, jobbers, and other distributors receiving products which are intended for resale shall maintain records showing the name or description of the products shipped or received in commerce, name and address of the seller of the products, date of receipt, net weight, number of shipping containers, and name of the carrier.

(f) *Retailers.* Retailers receiving products directly in commerce shall maintain records showing the name or description of such products, the name and address of the seller of the products, the date of receipt, net weight or number of head, and the number of shipping containers in the shipment.

(g) *Record retention period.* Any record required to be maintained by this section shall be maintained for a period of two years after the transaction, which is the subject of such record, has taken place.

§ 81.153 *Shipment of dressed poultry in commerce.*

Dressed poultry or any poultry slaughtered for human food or any part thereof, separately or in combination with other ingredients (other than poultry products) shall not be delivered, received, transported, sold or offered for sale or transport in commerce or from an official establishment, except as provided in the regulations in this part: *Provided* That such poultry may be transported from one official establishment to another official establishment or between an official establishment and a foreign country.

§ 81.155 *Products inspected pursuant to Agricultural Marketing Act.* Poultry and poultry products which, prior to January 1, 1959, have been inspected pursuant to the Agricultural Marketing Act of 1946, as amended, may move in commerce and into official establishments receiving inspection under the regulations in this part.

§ 81.156 *Distribution of inspected products to small lot buyers.*

For the purpose of facilitating the distribution in commerce of inspected poultry products to small lot buyers (such as small restaurants), distributors or jobbers may remove inspected poultry products from shipping containers or immediate containers, other than consumer packages, and place them into other shipping containers which do not bear the inspection mark: *Provided,* That the individual carcasses or consumer packages of the poultry products bear the inspection mark and the plant number of the establishment that processed such products: *And provided further,* That the shipping container is marked with the name and address of the distributor or jobber and bears the statement "The poultry product contained herein was inspected by the U.S.D.A."

§ 81.157 *Penalties inapplicable to carriers and public warehousemen.* No carrier or public warehouseman shall be subject to the penalties of the Act, other than the penalties for violation of section 11, by reason of his receipt, carriage, holding, or delivery, in the usual course of business, as a carrier or warehouseman, respectively, of slaughtered poultry or poultry products, owned by another person, unless the carrier or warehouseman has knowledge, or is in possession of facts which would cause a reasonable person to believe that such slaughtered poultry or poultry products were not inspected or marked in accordance with the provisions of the Act or were not otherwise eligible for transportation under the Act.

INSPECTION PERSONNEL AND ADMINISTRATION

PERFORMANCE OF SERVICES

§ 81.161 *Licensed inspectors.* (a) Any person who is a Federal or State employee possessing proper qualifications may be authorized by the Secretary to inspect poultry and poultry products pursuant to the regulations in this part. A license shall be issued to each such authorized Federal or State employee who is not an employee of the Poultry Inspection Service.

(b) All licenses issued by the Secretary shall be countersigned by the officer in charge of the poultry inspection service of the Agricultural Marketing Service or any other designated officer of such service.

§ 81.162 *Suspension of license; revocation.* Pending final action by the Secretary, the officer in charge of the inspection service may, whenever he deems such action necessary, suspend any license effective pursuant to the regulations in this part, by giving notice of such suspension to the respective individual involved, accompanied by a statement of the reasons therefor. Within seven days after the receipt of the aforesaid notice and statement of reasons by such individual, he may file an appeal, in writing, with the Secretary, supported by any argument or evidence that he may wish to offer as to why his license or authority should not be suspended or revoked. After the expiration of the aforesaid seven-day period and consideration of such argument and evidence, the Secretary will take such action as he deems appropriate with respect to such suspension or revocation. When no appeal is filed within the prescribed seven days the license is revoked.

§ 81.163 *Surrender of license.* Each license which is suspended, or revoked, or has expired shall promptly be surrendered by the licensee to his immediate superior. Upon termination of the services of a licensed inspector the licensee shall promptly surrender his license to his immediate superior.

§ 81.164 *Identification.* Each inspector shall have in his possession at all times, and present upon request while on duty, the means of identification furnished by the Department to such person.

§ 81.165 *Access to establishments.* Any duly authorized representative of the Secretary shall have access at all reasonable times, by day or night, whether the establishment is in operation or not, to the premises or any part thereof of an establishment engaged in processing poultry or poultry products for commerce, or in or for marketing in a designated major consuming area, upon presentation of appropriate credentials.

§ 81.166 *Financial interest of inspectors.* No inspector shall inspect any product in which he is financially interested.

§ 81.167 *Political activity.* All inspectors who are employees of the Department are forbidden during the period of their respective appointments, to take an active part in political management or in political campaigns. Political activity in city, county, state, or national elections, whether primary or regular, or in behalf of any party or candidate, or any measure to be voted upon, is prohibited. This applies to all appointees, including, but not being limited to, temporary and cooperative employees and employees on leave of absence with or without pay. Willful violation of §§ 81.166 and 81.167 will constitute grounds for dismissal in the case of appointees and revocation of licenses in the case of licensees.

§ 81.168 *Time of inspection:* The inspector who is to perform the inspection in an official establishment shall be informed, in advance, of the hours when such inspection will be required.

§ 81.169 *Schedule of operation of official establishment.* Operating schedules of an official establishment shall be subject to approval of, the Administrator, and for the purpose of this regulation the normal operating schedule shall consist of a continuous 8-hour period per day (excluding not to exceed 1 hour for lunch), 5 days per week, within the period of Monday through Saturday, for each full shift required. Any variation from such Monday through Saturday schedule of operation must be fully justified and approved in advance. Clock hours of daily operations are not to be specified in a schedule although as a condition of continuance of approval of a schedule the hours of operation must be reasonably uniform from day to day.

§ 81.170 *Overtime inspection service.* When operations in an official establishment require the services of inspection personnel beyond their regularly assigned tour of duty on any day, or on a day outside the established schedule, such services are considered as overtime work. The official establishment shall give reasonable advance notice to the inspector in charge for any overtime service necessary and shall pay the Secretary for such overtime at a rate of $5.00 per hour to cover the cost thereof.

§ 81.171 *Holiday inspection service.*

(a) When an official establishment requires inspection service on a holiday, such service is considered holiday work. The official establishment shall, in advance of such holiday work, request the inspector in charge to furnish inspection service during such period and shall pay the Secretary therefor at the rate of $5.00 per hour. Service in excess of 8 hours for that day is considered overtime and shall be paid for at the overtime rate.

(b) Holidays for Federal employees shall be the 1st day of January, 22d of February, 30th day of May, 4th day of July, 1st Monday of September, 11th day of November, 4th Thursday of November, 25th day of December, and any other calendar day designated as a holiday by Federal statute or executive order. When any of the above listed holidays fall on a scheduled workday, that day becomes a holiday, except that when an approved operating schedule encompasses both Sunday and Monday, Monday is treated as the holiday when the holiday falls on Sunday. When a holiday falls on scheduled nonworkdays the following rules apply:

(1) When a holiday falls on Sunday or a day designated in lieu of Sunday, the next scheduled workday is the holiday. When the approved operating schedule does not include Labor Day or Thanksgiving Day the next scheduled workday becomes the holiday;

(2) When a holiday falls on Saturday or any other scheduled nonworkday (other than those nonworkdays stated in 1 above) the preceding scheduled workday will become a holiday.

(c) Holidays to be counted with respect to State employees shall be those legally observed by employees of that State.

§ 81.172 *Supervisor overtime or holiday service.* When; because an establishment requires overtime service as provided in § 81.170 or requires holiday service as provided in § 81.171, a station supervisor (veterinarian) is required to work overtime or on a holiday, in the establishment, in order to supervise the service or to make final condemnation, the establishment shall pay the Secretary for such overtime or holiday work at the rate of $5.00 per hour.

§ 81.173 *Basis of billing establishments.* Overtime and/or holiday services shall be billed to the official establishments on the basis of each 15 minutes of overtime and/or holiday service performed by each inspector including supervisor providing such service to the establishment, except that when an official establishment requires the services of an inspector after he has completed his day's assignment and left the establishment or when he is called back to duty on a day outside of the established normal operating schedule or on a holiday, the official establishment shall pay for a minimum of two hours' service at the applicable established rate. Bills are payable upon receipt and become delinquent immediately following the end of the month in which they were rendered. Overtime or holiday inspection service will not be performed at any establishment that is delinquent and processing operations shall be confined to the regular operating schedule of the establishment.

§ 81.174 *Application for inspection under the Poultry Products Inspection Act.*

Application is hereby made for poultry inspection, in accordance with the applicable provisions of the Regulations Governing the Inspection of Poultry and Poultry Products (7 CFR Part 81), at the following-designated plant:

(Name of plant)

(Street Address) (City and State)

Type of Poultry Processing Operations

☐ Eviscerating ☐ Canning
☐ Dressing ☒ Other (Explain)

In making this application the applicant agrees to comply with the terms and conditions of the aforesaid regulations (including but not being limited to such instructions governing inspection of products as may be issued, from time to time, by the Administrator).

(Date)

(Applicant)

By (Signature)

(Title)

(Street Address)

(City) (State)

Application granted:

AGRICULTURAL MARKETING SERVICE,
By (Signature)

(Title)

(Date)

SUBPART B—EXEMPTIONS

§ 81.200 *Producer exemptions.* Poultry producers are hereby exempted from the inspection and other requirements of sections 6, 7, 8 and 9 (a) and (i) of the act and §§ 81.4 to 81.25, 81.31 to 81.114, and 81.118 to 81.147, and need not apply for exemption therefrom, with respect to poultry of their own raising on their own farms which they sell either as dressed poultry or poultry products directly to household consumers or restaurants, hotels, and boarding houses for use in their own dining rooms or in the preparation of meals for sales direct to consumers only: *Provided,* That such poultry producers do not engage in buying or selling poultry products other than those produced from poultry raised on their own farms: *And provided further,* That such poultry is healthy and is slaughtered and processed under such sanitary standards, practices and procedures as result in the preparation of sound, healthful and wholesome poultry and poultry products, and the shipping containers of such poultry and poultry products shall bear the producer's name and address and the statement "Exempted—P. P. I. A. 85-172."

§ 81.201 *Retail dealer exemptions.* Retail dealers who perform no processing operation except the cutting up of poultry products on the premises where such products are sold to consumers are hereby exempted from the inspection and other requirements of sections 6, 7, 8 and 9 (a) and (i) of the act and §§ 81.4 to 81.25, 81.31 to 81.114, and 81.118 to 81.147 and need not apply for exemption therefrom with respect to poultry products sold directly to consumers in the individual retail stores: *Provided,* That the poultry products are cut up under such sanitary standards, practices and procedures as will result in wholesome products being delivered to the consumer. Retail dealers who cut up and repackage at an individual store or other facility for distribution and sale in other individual stores where commerce is involved are not eligible for this exemption and are required to operate under inspection unless otherwise exempted.

§ 81.203 *Exemptions based on religious dietary laws.* (a) Any person who slaughters or processes poultry or poultry products which have been or are to be processed as required by recognized religious dietary laws may apply for exemption from specific provisions of the act or regulations which are in conflict with such religious dietary laws. Any person desiring an exemption shall apply in writing to the Chief, Poultry Inspection Service, Poultry Division, Agricultural Marketing Service, Department of Agriculture, Washington 25, D. C., setting forth the specific provisions of the act and regulations from which exemption is sought and setting forth the provisions of the religious dietary laws in support of the requested exemptions. In addition, the applicant for an exemption shall submit a statement from the clerical official having jurisdiction over the enforcement of the religious dietary laws, which enumerates the provisions pertaining to the slaughter and processing of the poultry and poultry products involved and a certification that such requirements are in conflict with specific provisions of the act and regulations from which exemption is sought.

(b) The Administrator, upon a determination that an exemption should be granted, may grant such exemption to the extent necessary to avoid conflict with such requirements while still effectuating the purposes of the Act. He may impose such conditions as to sanitary standards, practices, and procedures in granting such exemption as he deems necessary to effectuate the purposes of the act. Any person who processes poultry or poultry products under exemption from certain requirements as provided in this section shall be subject to all of the other applicable provisions of the act and the regulations in this part. Processing plants shall meet the sanitary requirements set forth in Subpart A of this part and be approved as official establishments. Slaughtered poultry which is prepared under an exemption authorizing the sale of noneviscerated poultry in commerce shall be individually identified with a label approved by the Administrator which identifies the clerical official under whose supervision the poultry was slaughtered. The shipping containers of all poultry and poultry products exempted under this section shall bear the plant number and the statement: "Dressed Poultry or Eviscerated Poultry (whichever is applicable)—Processed under USDA Exemption Permit No. 000," in lieu of the inspection mark.

§ 81.204 *Effect of exemptions on other persons.* Whenever a slaughterer or processor is granted an exemption under § 81.203 with respect to the slaughtering or processing of any poultry or poultry products under this subpart, under specified conditions, the sale, offer for sale, transportation and other handling in commerce by any person of such poultry and poultry products in accordance with such conditions is hereby authorized, except as restricted by the act.

§ 81.205 *Termination of exemptions.* The Administrator may by order suspend or terminate any exemption under section 15 of the act with respect to any person whenever he finds that such action will aid in effectuating the purposes of the act. Failure to comply with the conditions of the exemption, including, but not limited to, failure to process poultry and poultry products under clean and sanitary conditions may result in termination of an exemption, in addition to any other penalties provided by law.

§ 81.206 *Inspection of exempted plants and products.* Duly authorized inspectors of the Inspection Service are hereby authorized to make inspections in accordance with law to ascertain whether any of the provisions of the act or the regulations applying to exempted producers, retailers or other persons have been violated.

§ 81.207 *Violations involving exempted poultry or poultry products.* It is a criminal offense, punishable by fine or imprisonment, or both fine and imprisonment, for any person to sell, deliver, transport, or offer for sale or transportation in commerce any poultry or poultry products exempted under section 15 of the act which are unwholesome or adulterated and are intended for human consumption.

§ 81.208 Exemption of certain human food products which contain poultry.

The human food products listed in this section, which consist in part of edible parts of poultry, are hereby exempted from classification as poultry products under the Act: *Provided*, That the poultry used in such products is federally inspected or inspected under an approved foreign inspection system and the other conditions set forth herein are met.

(a) Soups which contain less than 2 percent cooked poultry meat: *Provided*, That the kind name (such as chicken or turkey) shall not be used in the product name.

(b) Dehydrated soups which contain less than 2 percent cooked poultry meat, computed on the basis of moist deboned cooked poultry: *Provided*, That the kind name (such as chicken or turkey) shall not be used in the product name.

(c) Soup bases which contain less than 2 percent cooked poultry meat, computed on the basis of moist deboned cooked poultry: *Provided*, That the kind name (such as chicken or turkey) shall not be used in the product name.

(d) Gravies, sauces, seasonings or flavorings which contain poultry meat or poultry fat only in condimental quantities.

(e) Bouillon cubes, poultry broths, poultry fat capsules, and sandwiches containing poultry.

(f) Food products which have been traditionally not regarded as poultry products such as noodles, tamales, pizza, ravioli, Brunswick stew, and fried rice, but which contain small amounts of poultry fat, skin or less than 2 percent poultry meat: *Provided*, That the kind name (such as chicken or turkey) shall not be used in the product name.

(g) Poultry dishes used in meals that are prepared by caterers or restaurants and served direct to consumers.

(h) For the purposes of this section only, the term "poultry meat" shall be construed to mean deboned white or dark meat, or both.

§ 81.300 *Requirements for importation into United States; definition of United States.* Slaughtered poultry or poultry products may be imported into the United States from any foreign country only in accordance with the regulations in this subpart. Dressed poultry may be imported into the United States only if it is consigned to an official establishment for inspection under the act. The term "United States," as used in this subpart, means the States, the District of Columbia, Alaska, Hawaii, and Puerto Rico.

§ 81.301 *Eligibility of foreign countries for importation of products into the United States.* (a) Whenever it is determined by the Administrator that the system of poultry inspection maintained by any foreign country is the substantial equivalent of the system maintained by the United States, notice of that fact will be given by listing the name of such foreign country in paragraph (b) of this section. Thereafter slaughtered poultry and poultry products from the countries so listed shall be eligible, subject to the provisions of this subpart and other applicable laws and regulations, for importation into the United States. Such products to be imported into the United States from these foreign countries must meet, to the extent applicable, the same standards and requirements that apply to comparable domestic products as set forth in the regulations in this entire part. Slaughtered poultry and poultry products from foreign countries not listed herein are not eligible for importation into the United States, except as provided by § 81.311.

(b) It has been determined that each of the following foreign countries maintain a poultry inspection system that is the substantial equivalent of the system maintained by the United States:

Canada.
France.

§ 81.302 *Imported products; foreign inspection certificates required.* (a) Except as provided in § 81.311, each consignment containing any slaughtered poultry or poultry product consigned to the United States from a foreign country shall be accompanied with a foreign inspection certificate substantially in the form illustrated in paragraph (b) of this section if it covers a poultry product, and in the form illustrated in paragraph (c) of this section if it covers dressed poultry or other slaughtered poultry.

(b) The form of foreign poultry product inspection certificate shall be as follows:

FOREIGN POULTRY PRODUCT INSPECTION
CERTIFICATE

Place ------------------ ------------
(City) (Country)
Date --------------------

I hereby certify that the poultry products herein described were derived from poultry which received ante mortem and postmortem inspections at the time of slaughter, and that such poultry products are sound, healthful, wholesome, clean and otherwise fit for human food, and are not adulterated and have not been treated with and do not contain any dye, chemical, preservative or ingredient not permitted by the regulations governing the inspection of poultry and poultry products of the United States Department of Agriculture, filed with me, and that said poultry products have been handled only in a sanitary manner in this country:

Kind of product

Number of pieces or packages	*Weight*
------------------	------------------
------------------	------------------
------------------	------------------

Identification marks on containers ---------
Consignor --------------------------------
Address ----------------------------------
Consignee --------------------------------
Destination ------------------------------
Shipping marks ---------------------------
(Signature) ------------------------
(Name of official of national foreign government authorized to issue inspection certificates for poultry products exported to the United States)
(Official title) ------------------------

(c) The form of foreign inspection certificate for dressed poultry or other slaughtered poultry [1] shall be as follows:

FOREIGN DRESSED POULTRY INSPECTION
CERTIFICATE

Place -------------------- Date ----------

I hereby certify that the dressed poultry herein described was derived from poultry which received ante mortem inspection at the time of slaughter and that such dressed poultry is sound, healthful, wholesome, clean and otherwise fit for human food and is not adulterated and has not been treated with and does not contain any dye, chemical, or preservative not permitted by the regulations governing the inspection of poultry and poultry products of the United States Department of Agriculture, filed with me, so far as could be determined by such ante mortem inspection, and that said dressed poultry has been handled only in a sanitary manner in this country.

Number of pieces or packages	*Weight*
------------------	------------------
------------------	------------------

Identification marks on containers ---------
Consignor --------------------------------
Address ----------------------------------
Consignee --------------------------------
Destination ------------------------------
Shipping marks ---------------------------
(Signature) ------------------------
(Name of official of national foreign government authorized to issue inspection certificates for dressed poultry exported to the United States)
(Official title) ------------------------

§ 81.303 *Importer to make application for inspection of imported products.* Each person who wishes to import any slaughtered poultry or poultry product shall make application for inspection, upon a form provided by the Administrator, to the Chief, Poultry Inspection Service, Poultry Division, Agricultural Marketing Service, Department of Agriculture, Washington 25, D. C., or to the officer in charge of the Poultry Division office at the port where the product is to be offered for importation, as long as possible in advance of the anticipated arrival of each consignment of such product, except in the case of product exempted from inspection by § 81.311. Each application shall state the approximate date on which the consignment is due to arrive in the United States, the name of the boat or other carrier transporting it, the name of the country from which the product was shipped, the place of destination, the quantity and kind of product, whether fresh, frozen, cured, or canned, and the point of first arrival in the United States.

§ 81.304 *Inspection of imported products.* (a) Except as provided in § 81.311, all slaughtered poultry and poultry products offered for importation from any foreign country shall be inspected in accordance with established inspection procedures, including the examination of the labeling information on the containers, by an inspector, before the same shall be admitted into the United States. Importers will be advised of the point where inspection will be made, and in case of small shipments (less then carload lots) the importer may be required to move the product to the location of the nearest inspector.

(b) Inspectors shall take, without cost to the United States, from each consignment offered for importation, samples of any product which is subject to analysis, except that samples of any product offered for importation under § 81.311 shall not be taken unless there is reason for suspecting the presence therein of a substance in violation of that section.

§ 81.305 *Imported products; retention in customs custody; delivery under bond; movement prior to inspection; sealing; handling; facilities and assistance.* (a) No slaughtered poultry or poultry product required by this subpart to be inspected shall be released from customs custody prior to inspection, but such product may be delivered to the consignee, or his agent, prior to inspection, if the consignee shall furnish a bond, in form prescribed by the Secretary of the Treasury, conditioned that the product shall be returned, if demanded, to the collector of the port where the same is offered for clearance through the customs.

(b) Notwithstanding paragraph (a) of this section, no product required by this subpart to be inspected shall be moved, prior to inspection, from the port of arrival where first unloaded, and if, arriving by water, from the wharf where first unloaded at such port, to any place other than the place designated in accordance with this subpart as the place where the same shall be inspected; and no product shall be conveyed in any manner other than in compliance with this subpart.

(c) Means of conveyance or packages in which any product is moved in accordance with this subpart, prior to inspection, from the port or wharf where first unloaded in the United States, shall be sealed with special import seals of the Department of Agriculture or otherwise identified as provided herein, unless already sealed with customs or consular seals in accordance with the customs regulations. Packages shall be securely tied before being offered for sealing. Such special seals shall be affixed by inspectors, or, if there is no inspector at such port, then by customs officer. In lieu of tying and sealing packages, the carrier or importer may furnish and attach to each package of product a warning notice on bright green paper, not less than 5 x 8 inches in size, containing the following legend in black type of a conspicuous size:

(Name of Truck Line or Carrier)

NOTICE

This package of poultry product must be delivered intact to an inspector of the Poultry Inspection Branch, U.S. Department of Agriculture.

WARNING

Failure to comply with these instructions will result in penalty action being taken against the holder of the customs entry bond.

If the product is found to be acceptable upon inspection, the package will be marked "Approved for Import Under P.P.I.A." and this warning notice defaced.

(d) No person shall affix, break, alter, deface, mutilate, remove, or destroy any special import seal of the Department of Agriculture, except customs officers or inspectors or as provided for in paragraph (f) of this section.

(e) No product shall be removed from any means of conveyance or package sealed with a special import seal of the Department of Agriculture, except under the supervision of an inspector or a customs officer, or as provided for in paragraph (f) of this section.

(f) In case of a wreck or similar extraordinary emergency, the special import seal of the Department of Agriculture on a car, truck, or other means of conveyance, may be broken by the carrier, and, if necessary, the articles may be reloaded into another means of conveyance for transportation to destination. In all such cases, the carrier shall immediately report the facts by telegraph to the Chief of the Poultry Inspection Service.

(g) The consignee, or his agent, shall furnish such facilities and shall provide such assistance for handling and marking products offered for importation as the inspector may require.

§ 81.306 *Means of conveyance and equipment used in handling products to be maintained in sanitary condition.* Compartments of steamships, railroad cars, and other means of conveyance transporting any product to the United States, and all chutes, platforms, racks, tables, tools, utensils, and all other devices used in moving and handling any product offered for importation into the United States, shall be maintained in a sanitary condition.

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[1] When slaughtered poultry other than dressed poultry is involved the word "dressed" shall be deleted throughout the certificate.

§ 81.307 *Marking of products offered for importation.*

(a) Poultry products which upon inspection are found to be acceptable for importation into the United States shall be marked "Approved for Import Under P.P.I.A.", or an authorized abbreviation thereof, and with the name of the station to which the inspector is assigned. Dressed poultry which upon inspection is found to be acceptable, shall be marked "Dressed Poultry—Eligible for Processing under U.S.D.A. Inspection". Products which are inspected and rejected shall be marked "U.S. Refused Entry." Such marks shall be applied to the shipping containers.

(b) To each consumer package of imported poultry product which has been inspected and passed in compliance with this part and which is to be removed from the shipping container at a place other than an official establishment, and thereafter to be transported in commerce, or to an official establishment, there shall be securely affixed, under the supervision of an inspector, a sticker, approved by the Administrator, bearing the wording "Approved for Import Under P.P.I.A." and an identifying serial number.

(c) To each consumer package of any imported poultry product which has been inspected and passed in compliance with this part and which is removed from a shipping container at an official establishment, a sticker bearing the wording "Approved for Import Under P.P.I.A." and the plant number shall be securely affixed, before the same shall be allowed to leave the establishment.

§ 81.308 *Foreign products offered for importation; reporting of findings to customs; handling of articles refused entry.* (a) Inspectors shall report their findings to the collector of customs at the port where products are offered for entry, and shall request the collector to refuse entry to all products which are marked or designated "U. S. Refused Entry" or otherwise are not in compliance with the regulations in this subpart. Unless such products shall be exported by the consignee within a time to be specified by the collector of customs (usually 30 days), the consignee, within such specified time, shall cause the destruction of such products for food purposes under the supervision of an inspector. If products are destroyed for food purposes under the supervision of an inspector, he shall give prompt notice thereof to the collector.

(b) Consignees shall, at their own expense, return immediately, to the collector of customs, in means of conveyance or packages sealed with the special import seal of the Department of Agriculture, any product received by them under this subpart which is marked or designated "U. S. Refused Entry," or which in any respect does not comply with this subpart.

(c) Except as provided in § 81.305 (a), no person shall remove or cause to be removed from any place designated as the place of inspection, any poultry product which the regulations in this subpart require to be marked in any way, unless the same has been clearly and legibly marked in compliance with this subpart.

§ 81.309 *Labeling of consumer packages of product for importation.* (a) Consumer packages of product offered for importation shall bear a label, printed in English, showing (1) the name of product; (2) the name of the country of origin preceded by the words "Product of," which statement shall appear immediately under the name of the product; (3) the word "Ingredients" followed by a list of the ingredients in case of product fabricated from two or more ingredients, including a declaration of artificial flavors, colors, or preservatives, if any; (4) the name and place of business of manufacturer, packer or distributor, qualified by a phrase which reveals the connection that such person has with the product; and (5) an accurate statement of the quantity of contents.

(b) The labels shall not be false or misleading in any respect.

§ 81.310 *Labeling of shipping containers of product for importation.* Shipping containers in which consumer packages of foreign product are shipped to the United States are required to bear the true name of the product and the name of the country of origin in a prominent and legible manner. Labeling on shipping containers shall be examined at the time of inspection and if found to be false or misleading, the product shall be refused entry.

§ 81.311 *Small importations for consignee's personal use.*

(a) Any product, other than dressed poultry which is forbidden entry by other Federal law or regulation, offered for importation in small quantity, exclusively for the personal use of the consignee, and not for sale or distribution, which is sound, healthful, wholesome, and fit for human food, and which is not adulterated and contains no substance not permitted by the Act or regulations in this part, may be admitted into the United States without foreign inspection certificates and such products are not required to be inspected upon arrival in the United States.

(b) The shipper of such products shall deliver to the initial carrier a certificate in the form set forth in paragraph (c) of this section which will authorize the shipment of such products in commerce. The duplicate copy of the certificate shall be forwarded immediately by the shipper to the Chief of the Poultry Inspection Service, Poultry Division, Agricultural Marketing Service, Department of Agriculture, Washington 25, D. C. The shipper's certificate shall be retained in the files of the initial carrier. The agent of the initial carrier and each succeeding carrier shall deliver to the connecting carrier a certificate in the form shown in paragraph (d) of this section.

(c) The form of certification required from the shipper pursuant to paragraph (b) of this section shall be as follows:

Date ____________________ 19__
Name of carrier ____________________
Shipper ____________________
Point of shipment ____________________
Consignee ____________________

I hereby certify that the following products were imported into the United States exclusively for the personal use of the consignee, and not for sale or distribution, and are exempted from inspection by the regulations governing the inspection of poultry and poultry products of the United States Department of Agriculture:

Kind of product	*Amount and weight*
________________	________________
________________	________________

____
(Signature of shipper)

____
(Address of shipper)

(d) The form of certification by the agent of the initial or succeeding carrier shall be as follows:

____
(Name of transportation company)

Imported for the personal use of consignee and exempt from inspection, as evidenced by shipper's certificate on file with initial carrier.

(Signed) ____________________
Agent
(The signature of the agent shall be written in full)

§ 81.312 *Returned United States inspected and marked products; not importations.* Products, which have been inspected by the United States Department of Agriculture and so marked, which are returned from foreign countries are not importations within the meaning of this part. Such returned shipments shall be reported to the Administrator by letter.

§ 81.313 *Imported product to be handled and transported as domestic; entry into official establishments; transportation.* (a) All imported products, after admission into the United States in compliance with this part, shall be deemed and treated and, except as provided in § 81.311 (b), shall be handled and transported as domestic product, and shall be subject to the provisions of this part and to the provisions of the Poultry Products Inspection Act and the Federal Food, Drug, and Cosmetic Act.

(b) Imported poultry products inspected, passed, and marked in accordance with this subpart may, subject to the provisions of the regulations in this part, be taken into official establishments and be mixed with or added to products in such establishments which have been inspected and passed therein.

(c) Imported poultry products which have been inspected, passed, and marked under this subpart may be transported in commerce, only upon compliance with the applicable regulations.

§ 81.314 *Imported products; charges for storage, cartage and labor with respect to products which are refused admission.* All charges for storage, cartage, and labor with respect to any imported product which is refused admission pursuant to the regulations in this subpart shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any other products imported thereafter by or for such owner or consignee.

(Sec. 14, 71 Stat. 447; 21 U.S.C. 463; 19 F.R. 74, as amended)

NOTE: The reporting and recordkeeping requirements contained herein have been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

Subpart D—Interpretations and Statements of Policy

§ 81.400 Interpretations and statements of policy with respect to producer exemption.

A poultry producer exempted pursuant to subsection 15(a)(1), of the Act:

(a) May sell, in accordance with section 15(a)(1), directly to hospitals (which are considered to be in the same category as restaurants, hotels, and boarding houses);

(b) May give away without charge slaughtered poultry of his own raising on his own farm and poultry products thereof, directly to household consumers or restaurants, hotels, hospitals, and boarding houses for use in their own dining rooms or in the preparation of meals for sale direct to consumers only;

(c) May not ship in commerce, for further processing by a person other than the producer, slaughtered poultry or poultry products which are to be sold in the State where processed or returned to the State of origin for sale therein, even if such sales are made to someone eligible to receive the articles under the producer exemption. Shipments in commerce may be made for purposes of freezing or storage and sale to eligible purchasers in any State;

(d) May not ship in commerce under the producer exemption poultry or poultry products which have been processed by a person other than the producer;

(e) May sell poultry for gift purposes, provided delivery is made by the producer directly to the person receiving the gift and the requirements under section 15(a)(1) are met.

§ 81.401 Interpretation and statement of policy applicable to certain carriers and caterers.

Airlines; caterers to airlines; steamship lines; and operators of railroad dining cars are not deemed to be in violation of subsections 9(a) or 9(i) of the Act by reason of the fact that uninspected dressed poultry and poultry products placed aboard the carriers for consumption on the carriers are not consumed within the State in which they were placed aboard the carriers provided the product does not move in commerce en route to the carriers.

AUTHORITY: §§ 81.400 and 81.401 issued under sec. 14, 71 Stat. 447; 21 U.S.C. 463.

Done at Washington, D.C., this 13th day of July 1961.

ROY W. LENNARTSON,
Deputy Administrator,
Agricultural Marketing Service.

[F.R. Doc. 61-6756; Filed, July 18, 1961; 8:47 a.m.]

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
POULTRY DIVISION

Amendment: Reprinted from Federal Register of February 7, 1962
(Insert in your copy of Regulations, 7 CFR, Part 81)

Title 7—AGRICULTURE

Chapter I—Agricultural Marketing Service (Standards, Inspections, and Marketing Practices), Department of Agriculture

SUBCHAPTER D—REGULATIONS UNDER THE POULTRY PRODUCTS INSPECTION ACT

PART 81—INSPECTION OF POULTRY AND POULTRY PRODUCTS

Miscellaneous Amendments

Pursuant to the authority conferred by the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), and sections 203 and 205 of the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1622, 1624), the regulations governing the inspection of poultry and poultry products (7 CFR Part 81, as amended) are hereby further amended as follows:

§ 81.95 [Amendment]

1. Section 81.95 is amended by adding thereto a new paragraph (d) to read:

(d) (1) The use of chemical additives in or on raw poultry products, other than salt (NaCl) which is added to chilling media in concentrations not in excess of 70 pounds to 10,000 gallons of water as an aid in chilling, shall be permitted only when they are approved by the Administrator, and each unit (whole carcass, disjointed portion, or consumer package thereof) of the poultry product so treated shall be labeled to declare the additive used and the purpose of its use. Notwithstanding the foregoing, the Administrator may authorize the shipment of raw poultry products so labeled only on the shipping container from an official establishment (i) to another official establishment for further processing, packaging and labeling of each unit in accordance with this paragraph and other applicable regulations in this Part, (ii) for sale to institutional users such as hotels and restaurants.

(2) The use of chemical additives, other than basic food stuffs and seasonings, in cooked poultry products shall be permitted only when they are approved by the Administrator. The Administrator may require in addition to listing in the statement of ingredients, a declaration of the additive used and the purpose of its use.

(3) Chemical additives, to be used in the preparation of poultry products, which have not been fully approved by the Administrator prior to the effective date of this amendment, will be approved only if they comply with the following criteria:

(i) The additive shall be safe under the conditions of its intended use.

(ii) The additive shall not promote deception or cause the product to be otherwise adulterated or unwholesome. Scientific data acceptable to the Administrator showing that the additive meets the criteria specified in this paragraph (3) shall be submitted by the person interested in having the additive approved.

§ 81.156 [Amendment]

2. Section 81.156 is amended by adding at the end thereof the following sentence: "However in lieu of such statement the container of imported products shall bear a statement that 'The products contained herein have been approved for importation under P.P.I.A.' "

§ 81.300 [Amendment]

3. In § 81.300 "Alaska" and "Hawaii" are deleted.

§ 81.301 [Amendment]

4. Section 81.301(a) is amended by adding at the end thereof the following: "In determining whether the inspection system of a foreign country is the substantial equivalent of the system maintained by the United States, the Administrator shall review the inspection regulations of the foreign country and make a survey to determine the manner in which the inspection system is administered within the foreign country. The survey of the foreign inspection system may be expedited by payment by the interested Government agency in the foreign country of the travel expenses incurred in making the survey."

§ 81.307 [Amendment]

5. In § 81.307 paragraphs (b) and (c) are deleted.

§ 81.309 [Amendment]

6. In § 81.309(a) the word "and" immediately preceding the figure "(5)" is deleted and the following is added before the period at the end of the paragraph: "; (6) the inspection mark of the country of origin; and (7) the plant number of the establishment at which the product was prepared."

7. Section 81.310 is amended to read:

§ 81.310 Labeling of shipping containers of product for importation.

Shipping containers in which consumer packages of foreign product are shipped to the United States are required to bear in a prominent and legible manner the true name of the product, the name of the country of origin, the plant number of the establishment in which the product was prepared, and the inspection mark of the country of origin. Labeling on shipping containers shall be examined at the time of inspection in the United States and if found to be false or misleading, the product shall be refused.

The amendments in part are intended to prevent the preparation of adulterated or unwholesome products at establishments subject to the Poultry Products Inspection Act and to prevent deception of consumers. For these purposes they establish the procedure and criteria applicable to the approval of chemical additives for use on or in poultry products and specify certain labeling requirements which shall apply to poultry products so treated. Notice of rule-making with respect to this matter was published in the FEDERAL REGISTER and opportunity was afforded interested persons to comment thereon. Due consideration has been given to all comments received and to all other information available to the Agricultural Marketing Service. The amendments are substantially the same as the published proposals in this respect, with the exception that the proposed requirement relating to consumer packaging of poultry products that have been treated with additives has been deleted. However, the provision requiring informative labeling of each unit of product that has been treated is retained. The proposal specifying that an additive must have a beneficial effect on the product as a prerequisite to approval has been deleted as unnecessary. The effect of the additive would obviously have to be considered in determining whether the additive would result in adulteration of the poultry product.

The provisions concerning the approval of foreign poultry inspection systems are intended to clarify existing provisions of the regulations relating to imports and to formalize procedure for payment of survey costs in connection with such approval. The changes in the labeling requirements for products to be imported are needed to identify the products as inspected poultry products. The requirement that the inspection mark of the country of origin be shown on containers is needed to facilitate the movement of imported products in commerce. This is also true of the amendment relating to labeling of shipping containers not bearing marks of inspection.

It does not appear that publication of further notice and other public procedure with respect to the amendments would make additional information available to the Department. It is therefore found under section 4 of the Administrative Procedure Act (5 U.S.C. 1003) that such procedure would be impractical and unnecessary.

The amendments shall become effective 30 days after publication hereof.

Done at Washington, D.C., this 1st day of February 1962.

G. R. GRANGE,
Deputy Administrator,
Marketing Services.

[F.R. Doc. 62-1287; Filed, Feb. 6, 1962; 8:48 a.m.]

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
POULTRY DIVISION

Amendments: Reprinted from Federal Register of August 15, 1962

(Insert in your copy of Regulations)

Title 7—AGRICULTURE

Chapter I—Agricultural Marketing Service (Standards, Inspections, Marketing Practices), Department of Agriculture

PART 70—GRADING AND INSPECTION OF POULTRY AND EDIBLE PRODUCTS THEREOF; AND UNITED STATES CLASSES, STANDARDS, AND GRADES WITH RESPECT THERETO

PART 81—INSPECTION OF POULTRY AND POULTRY PRODUCTS

Miscellaneous Amendments

Under authority contained in the Agricultural Marketing Act of 1946, as amended (7 U.S.C. 1621 et seq.) and the Poultry Products Inspection Act, as amended (21 U.S.C. 451 et seq.), the United States Department of Agriculture hereby further amends the regulations governing the grading and inspection of poultry and edible products thereof and United States classes, standards, and grades with respect thereto (7 CFR, as amended, Part 70) and the regulations governing the inspection of poultry and poultry products (7 CFR, as amended, Part 81).

Statement of considerations. The amendments provide that export certificates may be issued under the Poultry Products Inspection Act only at official establishments and that such certificates may be issued under the voluntary inspection and grading program, conducted under said Agricultural Marketing Act, at either the point of export (e.g., dockside or airport) or at a warehouse. Each shipping container covered by the export certificate must bear the number of the certificate so that adequate identification of the product can be maintained. In addition, when certificates are issued at points other than the official establishment, the products must be in the same form (frozen or unfrozen) as they were at the time they were released by the Department for distribution.

Section 81.208 of the regulations under the Poultry Products Inspection Act is amended so as to modify the provisions as to maximum percentages of poultry ingredients permitted in certain food products exempted from classification as poultry products, to clarify the exemption provisions, and to delete the provisions relating to the use of the kind name on certain exempted products. This document revokes the amendments of §§ 81.208 and 81.134 which were published on September 13, 1961, to become effective September 1, 1962, since the subject matter thereof is covered by the present amendments.

The amendments also clarify the conditions under which the terms "fresh frozen," "quick frozen," "frozen fresh," and "frozen" can be used, and make slight changes in the A quality standards for ready-to-cook geese.

Notice of proposed rule-making with respect to these amendments was published in the FEDERAL REGISTER of June 12, 1962, and opportunity was afforded interested persons to comment thereon. Due consideration has been given to all comments received and to all other information available to the Agricultural Marketing Service. The amendments conform in most respects to the proposals set forth in the notice, and deviations therefrom are made pursuant to comments of interested persons or in the interests of clarity. It appears that further notice and public rule making procedure on the matter would not make additional information available to this Department. Prompt action is necessary insofar as this document will revoke the September 13, 1961, amendments of §§ 81.134 and 81.208 since they would become effective September 1, 1962, in the absence of such action. Therefore under section 4 of the Administrative Procedure Act (5 U.S.C. 1003), it is found upon good cause that further public procedure with respect to this document is impracticable and unnecessary and good cause is found for making the revocation of said amendments of §§ 81.134 and 81.208 effective less than 30 days after publication in the FEDERAL REGISTER.

A. The provisions of the regulations under the Poultry Products Inspection Act, appearing in 7 CFR §§ 81.50(f)(1), 81.118, and 81.208, are amended to read, respectively, as follows:

§ 81.50 Temperatures and cooling and freezing procedures.

* * * * *

(f) *Freezing.* (1) Dressed and ready-to-cook poultry which is to be or is labeled with descriptive terms such as "fresh frozen," "quick frozen" or "frozen fresh" or any other term implying a rapid change from a fresh state to a frozen state shall be placed into a freezer within 48 hours after initial chilling in accordance with paragraph (b) or (c) of this section. During this period, if such poultry is not immediately placed into a freezer after chilling and packaging, it shall be held at 36° F. or lower. Dressed or ready-to-cook poultry handled in any manner other than as specified in this subparagraph and in subparagraph (2) of this paragraph may be labeled "frozen" if it is frozen under Department supervision and is in fact in a frozen state.

* * * * *

§ 81.118 Export certificates.

(a) Upon request, any inspector is authorized to issue an export certificate with respect to the shipment to any foreign country of any inspected and passed product, after adequate inspection of the product has been made by the inspector to determine its identity as inspected and passed and eligible for export: *Provided,* That the product is offered for inspection at an official establishment. Each shipping container covered by the export certificate shall be marked with a U.S. Department of Agriculture export stamp bearing the number of the export certificate. Export certificates will be issued only upon condition that the products covered thereby shall be subject to reinspection at any place and at any time prior to exportation to determine the identity of the products and their eligibility for certification, and such certificates shall become invalid if such reinspection is refused or discloses that the products are not eligible for such certification. If reinspection discloses that products are not eligible for such certification, a superseding certificate setting forth such findings shall be issued and copies shall be furnished to interested persons.

(b) The original and a duplicate of each export certificate shall be delivered to the person who requested such certificate or his agent. Additional copies of export certificates shall be prepared and distributed by the inspector in accordance with the instructions of the Administrator.

§ 81.208 Exemption of certain human food products which contain poultry.

The human food products listed in this section, which consist in part of edible parts of poultry, are hereby exempted from classification as poultry products under the Act: *Provided,* That the poultry used in such products is federally inspected or inspected under an approved foreign inspection system and the other conditions set forth herein are met.

(a) Any food product (in a consumer package) not otherwise provided for in this section, which contains less than 10 percent cooked poultry skins, giblets, fat or meat (deboned white or dark poultry meat, or both), separately or in any combination: *Provided,* That it contains less than 2 percent poultry meat. The aforesaid percentages of ingredients shall be computed on the basis of the moist, deboned, cooked poultry in the ready-to-serve product when prepared in accordance with the serving directions on the consumer package.

(over)

[fol. II]

(b) Any food product (in an institutional pack) which is prepared for sale to institutional users, such as hotels, restaurants and boarding houses, for use as a soup base or flavoring, which contains less than 15 percent cooked poultry meat (deboned white or dark poultry meat, or both) computed on the basis of the moist, deboned, cooked poultry meat in such product.

(c) Bouillon cubes, fat capsules, and sandwiches containing poultry product.

(d) Any food product that is prepared by caterers or restaurants and served by such caterers or restaurants direct to consumers.

(Sec. 14, 71 Stat. 447; 21 U.S.C. 463)

E. The definition of "product" in the regulations under the aforesaid Agricultural Marketing Act, appearing in 7 CFR § 70.1, and the provisions of said regulations appearing in 7 CFR 70.4(d), 70.170 (c), 70.173, and 70.284(f)(1), and the standard in 70.353(f) are amended to read, respectively, as follows:

§ 70.1 Definitions.

* * * * *

"Product" means each of the following: (1) Dressed poultry; (2) ready-to-cook poultry; (3) edible poultry byproduct; (4) poultry food product; (5) food product containing poultry product; and (6) with respect to grading service only, live poultry.

* * * * *

§ 70.4 Grading and inspection services available.

* * * * *

(d) Inspection service:

(1) In an official plant.

(2) At terminal markets and other receiving points.

§ 70.170 Forms of inspection certificates.

* * * * *

(c) Each export inspection certificate issued pursuant to the regulations in this part shall show the respective name of the exporter and the consignee, the destination of the products, the shipping marks, the names of the products, the total net weight thereof, and such other information as the Administrator may prescribe or approve.

§ 70.173 Export certificates.

(a) Upon request, any inspector is authorized to issue an export certificate with respect to the shipment to any foreign country of any product inspected and passed under the regulations in Part 81 of this chapter after adequate inspection of the product has been made by the inspector to determine its identity as inspected and passed and eligible for export, at either the point of export (e.g., dockside or airport) or at a warehouse other than the point of export.

(b) Upon request, any inspector is authorized to issue an export certificate with respect to the shipment to any foreign country of any products exempted from inspection under Part 81 of this chapter which are inspected and certified under this Part 70.

(c) Export certificates will be issued under this Part for products only if they are in the same form (e.g., frozen or unfrozen) as they were at the time they were released by the Department for distribution. Each shipping container covered by the export certificate shall be marked with a U.S. Department of Agriculture export stamp bearing the number of the export certificate. Export certificates will be issued only upon condition that the products covered thereby shall be subject to reinspection at any place and at any time prior to exportation to determine the identity of the products and their eligibility for certification, and such certificates shall become invalid if such reinspection is refused or discloses that the products are not eligible for such certification. If reinspection discloses that products are not eligible for such certification, a superseding certificate setting forth such findings shall be issued and copies shall be furnished to interested persons.

(d) The original and a duplicate of each export certificate shall be delivered to the person who requested such certificate. Additional copies of export certificates shall be prepared and distributed by the inspector in accordance with the instructions of the Administrator.

§ 70.284 Temperatures and cooling and freezing procedures.

* * * * *

(f) *Freezing.* (1) Dressed and ready-to-cook poultry which is to be or is labeled with descriptive terms such as "fresh frozen," "quick frozen," or "frozen fresh" or any other term implying a rapid change from a fresh state to a frozen state shall be placed into a freezer within 48 hours after initial chilling in accordance with paragraph (b) or (c) of this section. During this period, if such poultry is not immediately placed into the freezer after chilling and packaging, it shall be held at 36° F. or lower. Dressed or ready-to-cook poultry handled in any manner other than as specified in this subparagraph and in subparagraph (2) of this paragraph may be labeled "frozen" if it is frozen under Department supervision and is in fact in a frozen state.

* * * * *

§ 70.353 A Quality.

* * * * *

(f) *Disjointed and broken bones and missing parts.* Parts are free of broken bones. The carcass is free of broken bones and has not more than one disjointed bone. The wing tips may be removed at the joint and, in the case of geese, the parts of the wing beyond the second joint may be removed if removed at the joint and both wings are so treated. The tail may be removed at the base. Cartilage separated from the breastbone is not considered as a disjointed or broken bone.

(Sec. 203, 205, 60 Stat. 1087, 1090, as amended, 7 U.S.C. 1622, 1624)

These amendments shall become effective 30 days after publication in the FEDERAL REGISTER, with the exception that the amendment of § 81.208 shall become effective March 1, 1963.

The amendments of §§ 81.134 and 81.208 of the regulations under the Poultry Products Inspection Act, published September 13, 1961 (26 F.R. 8559), to become effective September 1, 1962, are revoked, effective upon publication hereof.

Done at Washington, D.C., this 10th day of August 1962.

G. R. GRANGE,
Deputy Administrator,
Marketing Services.

[F.R. Doc. 62-8179; Filed, Aug. 14, 1962; 8:55 a.m.]

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
POULTRY DIVISION

Amendments: Reprinted from Federal Registers of January 3 and 16, 1963

(Insert in your copy of Regulations, 7 CFR, Part 81)

Title 7—AGRICULTURE

Chapter I—Agricultural Marketing Service (Standards, Inspections, and Marketing Practices), Department of Agriculture

SUBCHAPTER D—REGULATIONS UNDER THE POULTRY PRODUCTS INSPECTION ACT

PART 81—INSPECTION OF POULTRY AND POULTRY PRODUCTS

Retail Dealer Exemptions

Under authority contained in the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), § 81.201 of the regulations governing the inspection of poultry and poultry products (7 CFR 81.201), relating to retail dealer exemptions, is hereby amended as set forth below.

The amendment provides that, except for poultry products to be carried by a consumer or to be delivered directly to a consumer by an employee of an exempted retail dealer, the shipping containers of poultry products distributed under the retailers' exemption of § 81.201 must bear the retailer's name and address, and the statement "Exempted—P.P.I.A. 85–172." Without this identification of exempted retailer shipments it is difficult for transportation companies to determine whether shipments by retailers are eligible for movement under the Poultry Products Inspection Act, and enforcement of the Act by this Department is hindered. The amendment also clarifies the retail dealer exemption provisions.

In order to effectuate the purposes of the Act, the amendment should be made effective as soon as possible. Affected persons do not need time in which to conform their operations to the requirements of the amendment inasmuch as the only substantive change made by the amendment requires markings on containers of poultry products which may be applied in writing or by stamp. Therefore, under section 4 of the Administrative Procedure Act (5 U.S.C. 1003), it is found upon good cause that notice of proposed rule-making and other public procedure on the amendment are impracticable and good cause is found for making the amendment effective less than 30 days after publication in the FEDERAL REGISTER.

Section 81.201 is amended to read as follows:

§ 81.201 Retail dealer exemptions.

Retail dealers are hereby exempted from the inspection and other requirements of sections 6, 7, 8, and 9(a) of the act and §§ 81.4 to 81.25, 81.31 to 81.114, and 81.118 to 81.147 and need not apply for exemption therefrom with respect to poultry products sold directly to consumers in the individual retail stores: *Provided*, That they perform no processing operation except the cutting up of poultry products on the premises where such products are sold to consumers and any cutting up of poultry products is done under such sanitary standards, practices and procedures as will result in wholesome products being delivered to the consumer: *And provided further*, That, except for products to be carried by a consumer or to be delivered directly to a consumer by an employee of the exempted retail dealer, the shipping containers of poultry products distributed under this exemption shall bear the name and address of the retail store and the statement "Exempted—P.P.I.A. 85–172". Retail dealers who cut up and repackage at an individual store or other facility for distribution and sale in other individual stores are not eligible for this exemption and where commerce is involved are required to operate under inspection unless otherwise exempted.

(Sec. 14, 71 Stat. 447, 21 U.S.C. 463; 19 F.R. 74, as amended)

The amendment shall become effective January 15, 1963.

Done at Washington, D.C., this 28th day of December 1962.

CLARENCE H. GIRARD,
Acting Deputy Administrator,
Marketing Services.

[F.R. Doc. 63–20; Filed, Jan. 2, 1963; 8:47 a.m.]

PART 81—INSPECTION OF POULTRY AND POULTRY PRODUCTS

Net Weight of Poultry Products; Wording on Labels

Under authority contained in the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), § 81.130(a)(3) of the regulations governing the inspection of poultry and poultry products (7 CFR 81.130(a)(3)) relating to the net weight or other appropriate measure of contents of containers of poultry products, is hereby amended as set forth below.

The amendment clarifies the original intent of § 81.130(a)(3) by making it more easily understood that the net weight required to appear on the immediate container of any poultry product is the net weight of the poultry product and includes, in addition to the weight of the poultry, the weight of any ingredient that is combined with the poultry in the product, and excludes the weights of the wet or dry packaging materials and giblet wrapping materials. Section 81.130(a)(3) has been so interpreted by this Department since it was originally promulgated.

In order to effectuate the purposes of the Act, the amendment should be made effective as soon as possible. Affected persons do not need time in which to conform their operations to the requirements of the amendment inasmuch as the amendment is only of a clarifying nature. Therefore, under section 4 of the Administrative Procedure Act (5 U.S.C. 1003), it is found upon good cause that notice of proposed rule-making and other public procedure on the amendment are impracticable and unnecessary and good cause is found for making the amendment effective less than 30 days after publication in the FEDERAL REGISTER.

Section 81.130(a)(3) is amended to read as follows:

§ 81.130 Wording on labels.

(a) * * *

(3) The net weight or other appropriate measure of the contents, except that the Administrator may approve the use of labels for certain types of immediate containers which do not bear the net weight: *Provided*, That the retailer or distributor supplying the retailer agrees in writing to the Administrator to mark the true net weight on the label prior to display and sale thereof: *And provided further*, That the shipping container bears a statement "Net weight to be marked on consumer packages prior to display and sale": *And provided further*, That the total net weight of the contents of the shipping container shall be marked on such container. The net weight marked on containers of poultry products shall be the net weight of the poultry products and shall not include the weights of the wet or dry packaging materials and giblet wrapping materials.

(Sec. 14, 71 Stat. 447, 21 U.S.C. 463; 19 F.R. 74, as amended)

The amendment shall become effective upon publication in the FEDERAL REGISTER.

Done at Washington, D.C., this 10th day of January 1963.

G. R. GRANGE,
Deputy Administrator,
Marketing Services.

[F.R. Doc. 63–452; Filed, Jan. 15, 1963; 8:49 a.m.]

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
POULTRY DIVISION

REGULATIONS GOVERNING THE INSPECTION OF POULTRY AND POULTRY PRODUCTS

Amendments: Reprinted from Federal Register of August 6, 1963

(Insert in your copy of Regulations, 7 CFR, Part 81)

Title 7—AGRICULTURE

Chapter I—Agricultural Marketing Service (Standards, Inspections, and Marketing Practices), Department of Agriculture

SUBCHAPTER D—REGULATIONS UNDER THE POULTRY PRODUCTS INSPECTION ACT

PART 81—INSPECTION OF POULTRY AND POULTRY PRODUCTS

Miscellaneous Amendments

Under authority contained in the Poultry Products Inspection Act (21 U.S.C. 451 et seq.), §§ 81.1, 81.3 and 81.123 of the regulations governing the inspection of poultry and poultry products (7 CFR Part 81), are hereby amended as set forth below:

Statement of considerations. The amendments state the policy of the Agricultural Marketing Service to waive certain provisions of the regulations under the act during periods of a national emergency, in order for the Department to be in a better position to carry out its responsibilities in the event such an emergency should arise. The definition of "Commerce" in the regulations is amended to conform to the definition in the Act of June 25, 1962 amending the Poultry Products Inspection Act. The amendments also provide that erasures or alterations may be made on certificates, provided they are initialed by the issuing inspector.

Insofar as the amendments constitute general statements of agency policy or relate to agency management, notice and other public procedure thereon and 30 days delay in effective date thereof are not required under section 4 of the Administrative Procedure Act (5 U.S.C. 1003). Insofar as the amendment of the definition of commerce is concerned, it merely conforms the regulations to the provisions of the controlling statute and has no impact upon the operations of persons subject to the Act. Therefore, under said section 4, it is found upon good cause that notice of rule making and other public procedure on such amendment are impracticable and unnecessary and good cause is found for making the amendment effective less than 30 days after publication in the FEDERAL REGISTER.

The amendments are as follows:

1. In § 81.1 the definition of "Commerce" is amended to read as follows:

§ 81.1 Definitions.

*   *   *   *   *

Commerce. "Commerce" means commerce between any State or the District of Columbia, and any place outside thereof; or between points within the same State or the District of Columbia, but through any place outside thereof; or within the District of Columbia; and the term "State" includes the Commonwealth of Puerto Rico and the Virgin Islands.

*   *   *   *   *

2. Section 81.3 is amended to read as follows:

§ 81.3 Administration.

(a) General authority to administer the act has been delegated to the Administrator subject to specified reservations (19 F.R. 74, as amended; 28 F.R. 496).

(b) The Administrator may in specific classes of cases waive for limited periods any provisions of the regulations in order to permit appropriate and necessary action in the event of a national emergency or to permit experimentation so that new procedures, equipment and processing techniques may be tested to facilitate definite improvements: *Provided,* That such waivers of the provisions of the regulations are not in conflict with the purposes or provisions of the act.

3. Section 81.123 is amended to read as follows:

§ 81.123 Erasures or alterations made on certificates.

Erasures or alterations not initiated by the issuing inspector shall not be permitted on a certificate or any copy thereof. All certificates rendered useless through clerical error or otherwise and all certificates cancelled for whatever cause shall be voided and initialed, and one copy shall be retained in the inspector's file; and the original and all other copies shall be forwarded to the Area Supervisor.

(Sec. 14, 71 Stat. 447, 21 U.S.C. 463; 19 F.R. 74, as amended)

The amendments shall become effective upon publication in the FEDERAL REGISTER.

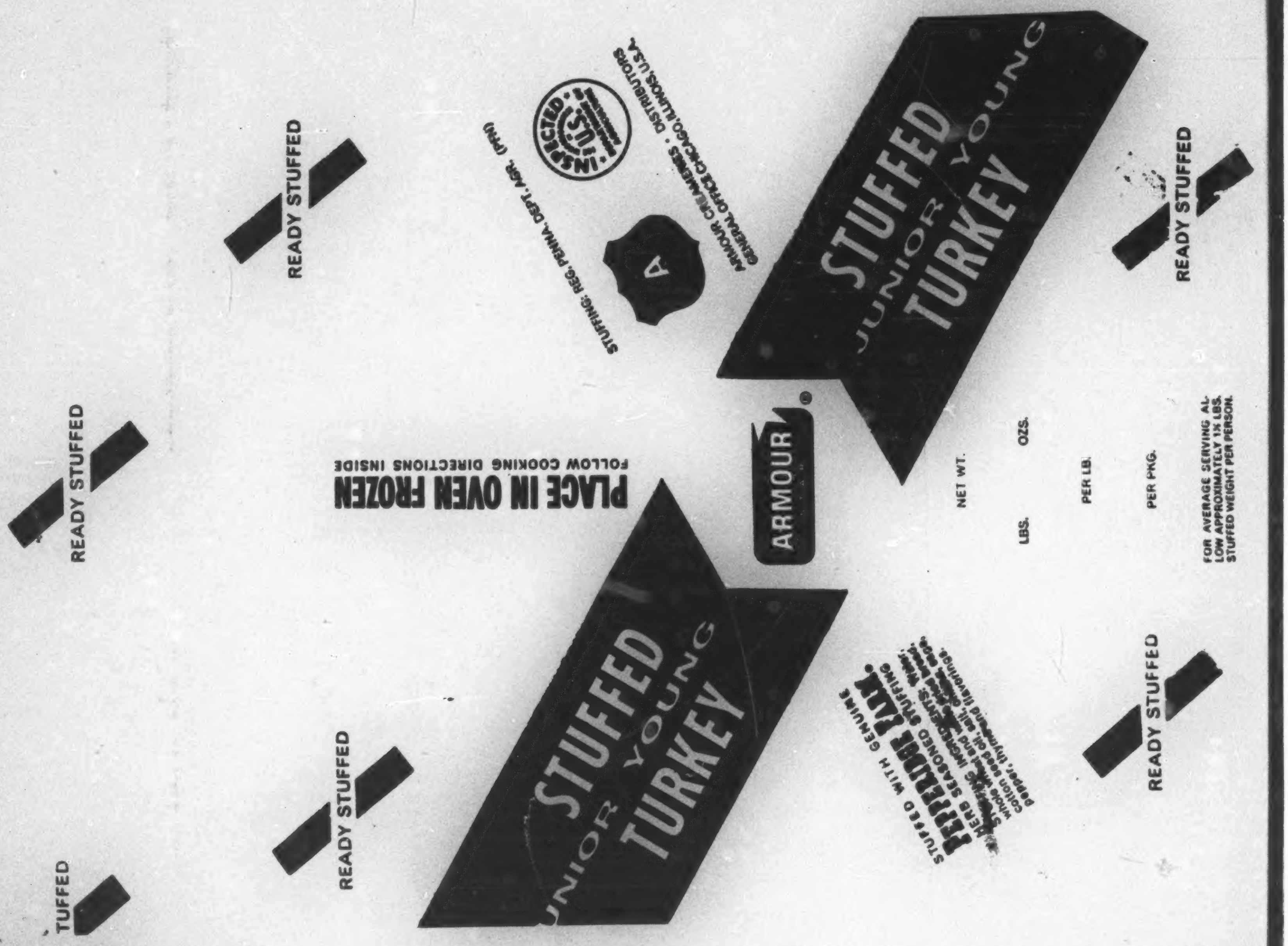
Done at Washington, D.C., this 31st day of July 1963.

G. R. GRANGE,
Deputy Administrator,
Marketing Services.

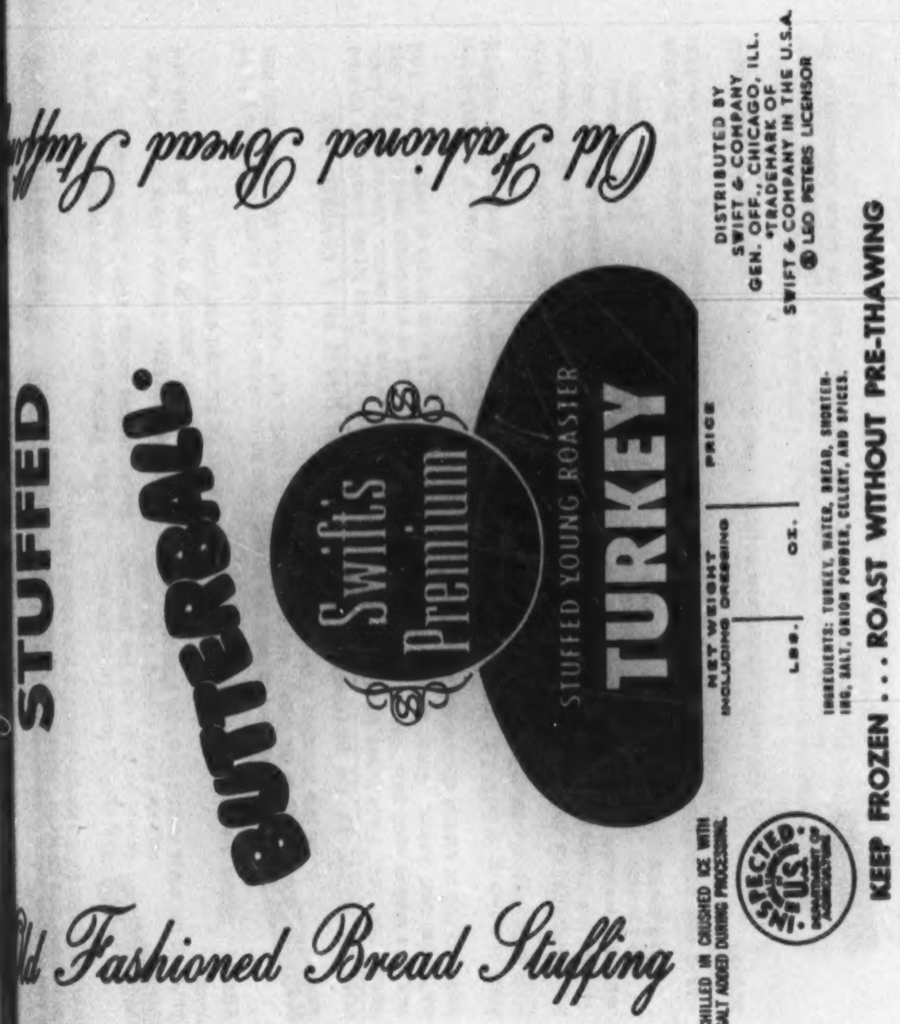
[F.R. Doc. 63-8341; Filed, Aug. 5, 1963; 8:58 a.m.]

[fol. MM]

Exhibit "B" to Amended Complaint


READY STUFFED
READY STUFFED
READY STUFFED
READY STUFFED
READY STUFFED
READY STUFFED
TUFFED
STUFFED JUNIOR YOUNG TURKEY
STUFFED JUNIOR YOUNG TURKEY
ARMOUR
PLACE IN OVEN FROZEN
FOLLOW COOKING DIRECTIONS INSIDE
A
INSPECTED · U.S. ·
ARMOUR CREAMERIES · DISTRIBUTORS
GENERAL OFFICE CHICAGO, ILLINOIS, U.S.A.
STUFFING: REG. PENNA. DEPT. AGR. (NN)
NET WT.
LBS.
OZS.
PER LB.
PER PKG.
FOR AVERAGE SERVING ALLOW APPROXIMATELY 1½ LBS. STUFFED WEIGHT PER PERSON.
STUFFED WITH GENUINE
PEPPERIDGE FARM
HERB SEASONED STUFFING
INGREDIENTS: Wheat flour
cotton seed oil, salt, onion
pepper, thyme and flavorings

BIT "C" TO AMENDED COMPLAINT

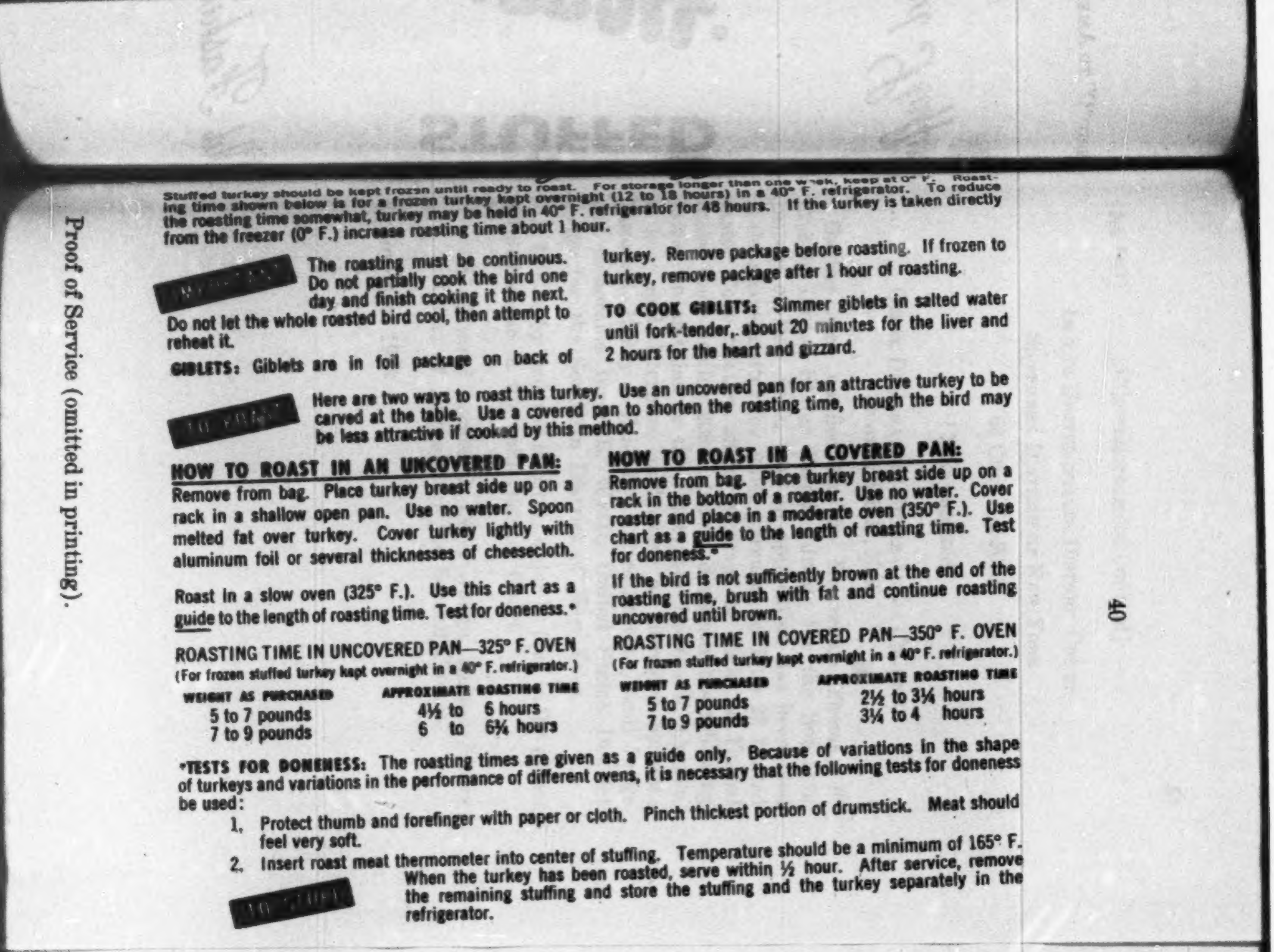

Old Fashioned Bread Stuffing
STUFFED
BUTTERBALL®
Swift's Premium
STUFFED YOUNG ROASTER
TURKEY
NET WEIGHT INCLUDING DRESSING
LBS.
OZ.
PRICE
ld Fashioned Bread Stuffing
INSPECTED U.S. DEPARTMENT OF AGRICULTURE

DISTRIBUTED BY
SWIFT & COMPANY
GEN. OFF., CHICAGO, ILL.
*TRADEMARK OF
SWIFT & COMPANY IN THE U.S.A.
® LEO PETERS LICENSOR

INGREDIENTS: TURKEY, WATER, BREAD, SHORTENING, SALT, ONION POWDER, CELERY, AND SPICES.

CHILLED IN CRUSHED ICE WITH SALT ADDED DURING PROCESSING.

KEEP FROZEN . . . ROAST WITHOUT PRE-THAWING



Stuffed turkey should be kept frozen until ready to roast. For storage longer than one week, keep at 0° F. Roasting time shown below is for a frozen turkey kept overnight (12 to 18 hours) in a 40° F. refrigerator. To reduce the roasting time somewhat, turkey may be held in 40° F. refrigerator for 48 hours. If the turkey is taken directly from the freezer (0° F.) increase roasting time about 1 hour.

[illegible] The roasting must be continuous. Do not partially cook the bird one day and finish cooking it the next. Do not let the whole roasted bird cool, then attempt to reheat it.

GIBLETS: Giblets are in foil package on back of turkey. Remove package before roasting. If frozen to turkey, remove package after 1 hour of roasting.

TO COOK GIBLETS: Simmer giblets in salted water until fork-tender,. about 20 minutes for the liver and 2 hours for the heart and gizzard.

[illegible] Here are two ways to roast this turkey. Use an uncovered pan for an attractive turkey to be carved at the table. Use a covered pan to shorten the roasting time, though the bird may be less attractive if cooked by this method.

HOW TO ROAST IN AN UNCOVERED PAN:

Remove from bag. Place turkey breast side up on a rack in a shallow open pan. Use no water. Spoon melted fat over turkey. Cover turkey lightly with aluminum foil or several thicknesses of cheesecloth.

Roast in a slow oven (325° F.). Use this chart as a guide to the length of roasting time. Test for doneness.*

ROASTING TIME IN UNCOVERED PAN—325° F. OVEN
(For frozen stuffed turkey kept overnight in a 40° F. refrigerator.)

WEIGHT AS PURCHASED	APPROXIMATE ROASTING TIME
5 to 7 pounds	4½ to 6 hours
7 to 9 pounds	6 to 6¾ hours

HOW TO ROAST IN A COVERED PAN:

Remove from bag. Place turkey breast side up on a rack in the bottom of a roaster. Use no water. Cover roaster and place in a moderate oven (350° F.). Use chart as a guide to the length of roasting time. Test for doneness.*

If the bird is not sufficiently brown at the end of the roasting time, brush with fat and continue roasting uncovered until brown.

ROASTING TIME IN COVERED PAN—350° F. OVEN
(For frozen stuffed turkey kept overnight in a 40° F. refrigerator.)

WEIGHT AS PURCHASED	APPROXIMATE ROASTING TIME
5 to 7 pounds	2½ to 3¼ hours
7 to 9 pounds	3¼ to 4 hours

***TESTS FOR DONENESS:** The roasting times are given as a guide only. Because of variations in the shape of turkeys and variations in the performance of different ovens, it is necessary that the following tests for doneness be used:

1. Protect thumb and forefinger with paper or cloth. Pinch thickest portion of drumstick. Meat should feel very soft.
2. Insert roast meat thermometer into center of stuffing. Temperature should be a minimum of 165° F.

[illegible] When the turkey has been roasted, serve within ½ hour. After service, remove the remaining stuffing and store the stuffing and the turkey separately in the refrigerator.

Proof of Service (omitted in printing).

[fol. OO] [File endorsement omitted]

In the United States District Court

Southern District of New York

63 Civil No. 3085

[Title omitted]

Order Designating Three Judge Court— November 21, 1963

Having been notified by the Honorable Thomas F. Croake, United States District Judge for the Southern District of New York, that an application has been filed in the above matter for relief pursuant to Title 28 United States Code Section 2281, pursuant to Title 28 United States Code Section 2284 I hereby designate the following judges, in addition to the Honorable Thomas F. Croake, to hear and determine said cause as provided by law: Honorable Henry J. Friendly, United States Circuit Judge and Honorable Inzer B. Wyatt, United States District Judge for the Southern District of New York.

It Is Hereby Ordered that this order be filed in the above entitled cause in the said District Court.

J. Edward Lumbard, Chief Judge, United States Court of Appeals for the Second Circuit.

21 November 1963

[fol. PP] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civil 3085

[Title omitted]

ANSWER—Filed December 5, 1963

The defendant, by his attorney, Louis J. Lefkowitz, Attorney General of the State of New York, answers the amended complaint as follows:

First Defense

This Court lacks jurisdiction over the subject matter of this action.

Second Defense

The amended complaint fails to state a claim upon which relief can be granted.

Third Defense

This Court should abstain from adjudicating any issues respecting the state statutes and regulations and interpretation thereof challenged by the amended complaint until their construction and interpretation have been determined by the New York State Courts. Plaintiff, Swift & Company, Inc. failed to appeal from a judgment of the Criminal Court of the City of New York obtained in November, 1962, by the Department of Markets of the City of New York for violation of § 193 of the Agriculture [fol. QQ] and Markets Law nor has either plaintiff resorted to other remedies available in the state courts in order to determine the issues raised in the amended complaint herein nor has either plaintiff resorted to the remedies available to them in the Poultry Products Inspection Act, 21 U.S.C. § 451 *et seq.*

Fourth Defense

1. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs "First", "Second", "Fifth", "Sixth", "Seventh", "Tenth", "Twelfth", "Thirteenth", "Fourteenth", "Eighteenth", "Nineteenth", "Twentieth", "Twenty-First" and "Twenty-Second" of the amended complaint.

2. Defendant denies each and every allegation contained in paragraph "Eleventh", "Twenty-Third" and "Twenty-Fourth" of the amended complaint.

3. Defendant denies each and every allegation contained in paragraph "Fourth" of the amended complaint except admits as the statute indicates.

4. Defendant denies each and every allegation contained in paragraph "Seventeenth" of the amended complaint except admits that defendant has interpreted § 193 of the Agriculture and Markets Law of the State of New York and Regulation 221.40 promulgated in connection therewith to require that frozen stuffed turkeys selling at retail bear a label separately stating the net weight of the turkey, the net weight of the stuffing and the total net weight of the entire package.

[fol. RR] Wherefore, defendant demands judgment that the amended complaint herein be dismissed and that he be awarded costs and disbursements of this action.

Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for Defendant.

Philip Kahaner, Assistant Attorney General, Office & P. O. Address, 80 Centre Street, New York, New York 10013.

[fol. SS] Affidavit of Service (omitted in printing).

[fol. TT] [File endorsement omitted]

[fol. 1]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 63 Civ. 3085

SWIFT & Co. and ARMOUR & Co., Plaintiffs,

vs.

DON J. WICKHAM, Commissioner of Agriculture & Markets for the State of New York, Defendant.

Transcript of Hearing—March 5, 1964

New York
2:00 o'clock p.m.
Room 905

Before: Hon. Henry J. Friendly, Circuit Judge, Hon. Thomas F. Croake, District Judge, and Hon. Inzer B. Wyatt, District Judge, Sitting as a statutory court.

APPEARANCES:

William J. Condon, Esq. and William J. Colavito, Esq., Attorneys for Plaintiff Swift & Co.

Evans, Orr, Gourlay & Pacelli, Esqs., Attorneys for Plaintiff Armour & Co., E. Gordon Robbins, Esq., of Counsel.

[fol. 2] Louis J. Lefkowitz, Esq., Attorney General of the State of New York, Attorney for Defendant State of New York, Philip Kahaner, Esq. and Lester Esterman, Esq., of Counsel.

The Clerk: Swift & Co. and Armour & Co. versus Don J. Wickham, Commissioner of Agriculture and Markets for the State of New York.

Gentlemen, are you ready?

Judge Friendly: Gentlemen, I understand that the plaintiffs want to adduce some evidence, which I take it is necessary since some of the allegations in the complaint are denied.

How do you wish to proceed? Who wants to go forward?

Mr. Condon: If your Honor please, before we begin, if I may ask your indulgence, I would like to introduce to the Court Mr. E. Gordon Robbins, attorney from the State of Illinois, admitted to practice in the Northern District of Illinois, and I ask that he be admitted to practice in this court for the purpose of this case only, representing Armour.

Judge Friendly: Yes.

COLLOQUY, STIPULATION OF COUNSEL AND OFFERS IN EVIDENCE

Mr. Condon: Secondly, I might say this, your Honor—[fol. 3] this is in response to your earlier question—in order to put on an orderly presentation as quickly as we can, it has been agreed between counsel that I will present all the evidence on behalf of both plaintiffs and we will put it on as one case, if that is satisfactory to your Honor.

Judge Friendly: Yes, it is very satisfactory. Do you want to call a witness, or offer your depositions, or do you want to proceed?

Mr. Condon: First, if I may, I am authorized by the Assistant Attorney General to state that it has been stipulated between counsel that Swift & Co. is a corporation duly organized and existing under the laws of Illinois and duly qualified to do business in the State of New York; that Armour & Co. is a corporation duly organized and existing under the laws of Delaware and is duly qualified to do business in New York.

Finally, it is stipulated between counsel that the testimony of Mr. Burke of Armour & Co. in his deposition given before trial, referring specifically to page 15A thereof, wherein Mr. Burke testified that Armour & Co.

does not sell stuffed turkeys in any part of the State of New York, is erroneous.

[fol. 4] It is stipulated the fact is that Armour & Co. does sell in some parts of New York State, as is the case with Swift & Co.

Mr. Kahaner: At the present time we are agreed, up to the time that this had been going on, up to the present time they are still selling them, both plaintiffs are still selling stuffed turkeys in certain parts of New York.

Mr. Condon: Right.

Judge Wyatt: What was the page?

Mr. Condon: 15A, your Honor.

Judge Friendly: In other words, the answer to "Do you sell these turkeys in any other part aside from New York City" is "No, sir, we do not"—it is stipulated that is erroneous?

Mr. Condon: That is correct.

At this time, for the record, your Honor, I would like to offer in evidence the original request for admissions which were served upon the defendant by the plaintiffs.

(Plaintiffs' Exhibit 1 received in evidence.)

Judge Friendly: Any objection?

Mr. Kahaner: Your Honors, we have complied with the [fol. 5] request as much as possible and we have filed the original. We had three here for each of the members of the Court, which I would like to hand up.

Judge Friendly: Very good.

The Clerk: Are you offering those?

Mr. Kahaner: Yes.

Judge Friendly: Are you offering that?

Mr. Kahaner: I am offering that in compliance with the notice to admit.

(Defendant's Exhibit A received in evidence.)

Mr. Condon: I call to your attention also at this time—I offer in evidence the deposition of John F. Madden, taken by the plaintiffs, copies of which have already been filed with the Court, I understand.

Judge Friendly: Is there any objection?

Mr. Kahaner: No objection.

Judge Friendly: It will be received.

Mr. Kahaner: We are also producing in evidence copies of an examination before trial of plaintiffs' witness or witnesses which have already been filed with the court.

Judge Friendly: That is Mr. Burke and Mr. Maidlow?

[fol. 6] Mr. Kahaner: Yes, sir.

Judge Friendly: You want to offer those as your exhibits?

Mr. Kahaner: I beg your pardon?

Judge Friendly: Are you offering those as defendant's exhibits, or is the plaintiff offering them?

Mr. Kahaner: We are offering them as defendant's exhibits. We can wait until our case goes in, then.

Judge Friendly: Well, don't you think that the plaintiff—we may as well receive them now.

Do you have any objection?

Mr. Condon: I have no objection to receiving them.

Judge Friendly: The clerk will mark Mr. Burke's examination as Defendant's Exhibit B and Mr. Maidlow's as Defendant's Exhibit C.

Mr. Condon: They have already been filed. The original and three copies have been filed.

The Clerk: Yes.

Judge Friendly: Then Mr. Madden's will be Plaintiffs' Exhibit 2.

[fol. 7] Judge Wyatt: And Defendant's Exhibit A are the answers to the requests for admission?

Mr. Kahaner: Yes.

Judge Wyatt: All right.

Mr. Condon: I call Mr. Charles Atkin.

Charles Atkin, called as a witness by plaintiffs, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Condon:

Q. Mr. Atkin, will you state your position, please?
A. I am a superintendent of the turkey plant of Swift & Co. at Detroit Lakes, Minnesota.

Mr. Kahaner: A little louder, please.

A. Superintendent of the turkey plant for Swift & Co. at Detroit Lakes, Minnesota.
Q. Now, in that position, Mr. Atkin, what are your responsibilities?
A. The production and operation of the plant.
Q. What products do you produce at that plant?
A. We dress turkeys and put up stuffed turkeys and also dress a few fowl.
Q. Will you describe for us the operation from the beginning of your responsibility to the end of it of stuffing [fol. 8] the turkey?
A. After the turkeys are bought by buyers, who go out in the country and inspect flocks, then it's my responsibility to get the trucks out, pick them up and bring them into the plant and dress them.

We bring them in on trucks, weighed—and try to bring those scales into the plant—and defeathered, first hung on shackles running through the plant, defeathered and then eviscerated—

Mr. Kahaner: Excuse me. I find it difficult to hear the witness.
Judge Friendly: Will you talk a little louder, please.
The Witness: Yes.

A. (Continuing) Brought into the plant, hung on conveyor chains or shackles, as we call them, go through the dressing operation, which is the defeathering operation; then they go from there through another part of the plant where they are eviscerated and then go from there into slush ice and water in a tank where they are chilled overnight.

And from there they go to different departments which might be the stuffing department or just the regular turkey department where they are packed in Cryovac bags and [fol. 9] frozen.

Q. All right. Now, this—

A. It's roughly the summation of it.

Q. What do you mean by "dressing"?

A. Dressing—I refer to dressing as defeathering.

Q. Defeathering?

A. Yes.

Q. Do you ever kill these turkeys?

A. Yes, we do. That's part of the dressing operations. They are killed, throats cut, shocked with electric shocker and throats cut and they bleed to death and they are scalded, run through a machine where the defeathering operations take place.

Then we have girls working for finishers that get whatever feathers that the machines don't get and then the—after coming out of the machines, the tendons are pulled.

That's the first operation we do after the bird is defeathered.

Then they go into the next operation. They are washed again.

Then they go through—the girls defeather, finisher's work, singed.

[fol. 10] After they get any hair that might be on them off, then they go where the hocks are cut off in the joint and then the next operation would be they would remove the oil sac, slit the necks and then they are hung in three-point suspension, that is, the legs are hung up for hanging by the heads, the necks.

While all this is going on, the girls open the abdominal cavity and pull out part of the intestine and washes it so that if it is handled it won't contaminate the bird.

Then it goes to—the intestines are pulled out the right side when they are presented to the U.S.D.A. inspectors for post-mortem examination in which they check the viscera, the condition of the bird and general conditions and the birds are either passed or rejected and then they go on to the next operation.

We have girls that are called trimmers. Any small defects that may be on a bird is removed by the trimmers. The inspectors inspect them, point them out to them. They treat them in this manner and then they go through the giblet cleaners where the hearts and livers and gizzards are [fol. 11] cleaned and then they go next to the machine where you remove the lungs by a vacuum machine, which removes the lungs, and any particles that might be missed by the hand pullers.

Then the heads are removed. Then the crops—then we have our own inspector at this point where the birds are washed inside thoroughly by high pressure injection and then the next operation is our own house inspector which inspects them again to see that they are all cleaned properly inside.

Then they go through one other washer and the necks are removed, and then they go to packing, dropped off the line where they are butterballed, we call it, or trussed.

Then they go into the tanks for chilling overnight.

Q. What do you mean by "trussed"?

A. The legs are tucked into the abdominal straps, trussed them up so they don't protrude.

Q. Now, after they have been in the tanks, the crushed ice tanks overnight, the next day they are ready for stuffing, is that correct?

A. Well, the birds that are selected for stuffing—we have a man at the end of the line that selects only the birds [fol. 12] that will do because of sizes and conformation, of course; we only stuff certain sizes of birds on orders, as a rule, and whatever size is selected; also for their quality, they are inspected for quality to be sure that we have nothing but the best quality going into the stuffed bird operation.

Then they are chilled overnight for the stuffing operations.

Q. How do you prepare your stuffing?

A. Well, the stuffing is prepared from ingredients that we buy our ingredients of red croutons, Preem, a vegetable shortening manufactured by Swift, and spices, and these ingredients are stored in a freezer where they are chilled down to a low temperature, and then they are brought out into—these two people work on this operation in our plant, a man who makes, runs the mixture.

Then we have what we call a spice girl that she mixes the spices and sterilizes them in a steam cabinet, and as he is mixing puts the bread in the mixer and adds the oils, and while he is doing this, she sterilizes the spices and they go from the sterilizer—spice sterilizer into the mixer and [fol. 13] they are mixed until they are thoroughly mixed and then they are dropped off into steamless steel vats, the mixer, and put back in the steamer until it is held at least 40 degrees or lower before it is used for stuffing into the bird.

And this whole operation is under the control of our quality insurance department who have a bacteriologist and two technicians that supervise the department all the way through.

They take samples of all ingredients as they are received into plants and bacteriological samples are run on them and moisture contents because our specifications are no more than ten per cent bread crumbs, and the powder and the other ingredients no more than four per cent.

And then they look at them and when they meet specifications, they are approved for use.

When the spices are mixed and sterilized, they take periodic samples of that to see there is no bacteria and no contamination, and they are ready.

Q. Now, let's go back and pick up the turkey again that we selected and it is ready for stuffing. Let's bring the two things together.

Will you describe the stuffing operation from the time the [fol. 14] turkey comes out of that tank?

A. Well, at the time the turkey comes out of the tank, there is a U.S.D.A. man at that point, a licensed man working under Mr. Klein, the government employee on the plant, and he grades all the turkeys that goes on to the line so nothing but A-grade turkeys are offered for stuffing and he is also responsible for—to Mr. Klein for sanitation, that everything is in order when the bird is offered to the stuffing department.

It is hung on this line.

The first thing is it is washed thoroughly with sprayers and then it goes from there to another inspector down the line who looks to see that there is no pinfeathers that might have been overlooked, and then it goes through the washer again and then it—the cavity of the bird is sterilized by pressure for ten seconds and then it goes from there direct and taken out the line and offered to the people who are running the stuffing machines.

We have two stuffing machines, and at this point there is a stuffing injected into the bird by a little logger.

Water is also incorporated with the dressing at this time, [fol. 15] moisture, and then the bird from there is taken off the line and passed across the table to a girl who tests it over to see that it's not overly stuffed.

In other words, we stuff the conformation of the bird and no dressing is left, crumbs that get on the outside of the bird.

You see, girls who handle the turkeys at all times wear surgical gloves and continuously sterilize and wash their gloves continuously.

After handling each bird their hands have to be rinsed, dipped in a chlorine solution, and picks up the bird.

This is followed closely all down the line.

After picking up the bird to see if any crumbs might be on it, styles it, we call it, to see that the conformation is not out of proportion; remove the dressing.

Then it's passed down to the girl who puts it in the bay, and from there passed down to the conveyor where the girl puts the giblets which have been packaged in a foil package down the back of the bird in between the wings.

Then it goes to a machine which evacuates the air [fol. 16] through the bag, sets the bird up.

Then it goes to our scaler, who weighs the bird.

Then it goes to a shrinking tank which the bag is shrunk.

Then it goes into our liquid freezer.

It takes it about thirty minutes to go through the liquid freezer and it comes out the other end and goes immediately into the blast freezer—

Judge Wyatt: Mr. Atkin, is there only one department of agriculture for post-mortem inspection?

The Witness: No, there is two men working on the line, double line, and one works on the one side of the line and the other on the other.

Judge Wyatt: Yes. Each in the same step or process?

The Witness: Yes.

Judge Wyatt: You told us about that.

The Witness: Yes, sir.

Judge Wyatt: Now, after that department of agriculture inspection, none of the other steps are inspected?

The Witness: Yes, Mr. Klein, under the supervision—

[fol. 17] Judge Wyatt: No, the Department of Agriculture. Mr. Klein is your man.

The Witness: No, sir.

Judge Wyatt: Oh, he is the Department of—

The Witness: The Department of Agriculture employee.

Judge Wyatt: I see. Thank you.

The Witness: He has licensed inspectors operating under him.

Judge Wyatt: And he is the man who is there at the stuffing operation?

The Witness: Yes, sir.

Judge Wyatt: And he is from the Department of Agriculture?

The Witness: Yes, sir.

Judge Wyatt: All right.

Judge Croake: Do you weigh the birds in any way before they go through the stuffing operation?

The Witness: Well, I was afraid there would be possibilities of the—when moving it across the scale—

Judge Croake: Would it be sterilized in the same manner as with the other?

[fol. 18] The Witness: It would take a number of scales to handle—

Judge Croake: I am just talking about the bird just before it goes through the operation of being stuffed and the giblets—

The Witness: I don't know.

Judge Friendly: I suppose you are going to try to develop that, Mr. Condon. I assume that is what all this is leading up to.

Judge Croake: Yes, I won't ask it then.

Judge Friendly: It is interesting to hear this, but I assume you are leading up to this, some showing as to whether it would be practical from your point of view to do this, do what Judge Croake has suggested.

Mr. Condon: Well, I will develop that a little bit, if your Honor please, but our claim is not so much impracticability as it is government refusal to permit it.

Judge Friendly: I will hear about that, too.

Mr. Condon: We will get to that, too.

I have a little small problem at this point. I would like the witness to use this in his testimony. It's a frozen turkey. May I ask that it be marked for identification?

[fol. 19] Judge Friendly: I hope we have some means for keeping it frozen; otherwise, we might have to move it out of the courtroom.

Mr. Condon: Counsel is concerned, he told me, lest we turn this into a food-poisoning case before we get through.

(Plaintiffs' Exhibit 3 marked for identification.)

By Mr. Condon:

Q. I show you Plaintiffs' Exhibit 3 for identification, Mr. Atkin. I ask you, first of all, if that turkey was produced at your plant?

A. It was.

Q. How can you tell that?

A. Government No. P576. That's us.

Q. That's what?

A. Government plant number.

Judge Wyatt: Where is that?

The Witness: Right here. And then again right here on the clip: P576.

Judge Wyatt: That is the Department of Agriculture mark?

The Witness: That is the rating stamp and there you [fol. 20] see also a stamp on the Cryovac bag.

Judge Wyatt: That is the official designation?

The Witness: Yes, sir, U. S. Department of Agriculture.

Q. Would you hold that up and tell us where the stuffing is put into that thing?

A. First the stuffing is—the stuffing horn, we call it, a tube is inserted in the abdominal cavity at this point and the stuffing is put in there as lightly as we can.

We fill the cavity, but don't cram it.

And then as the stuffing—bird is pushed off the machine and pushed off by its own weight, packed and cleaned, and the girl raises the skin with a horn and then pulls it down over and then it's passed over. The stuffing is put in the bag.

Q. You referred in your description of this operation to styling the bird, I think you said.

A. Yes.

Q. What do you mean by that?

A. You see, the conformation here is not deformed looking. It looks like the conformation of the bird.

The girl can remove it, or, if it is—send it back if it isn't [fol. 21] properly stuffed, so it has a natural look, a stuffed look, but not a great big gob of dressing up in front.

Q. I will take it out of your hand so it won't freeze.

A. It's cold.

Judge Croake: I am sure we would let you substitute pictures.

Mr. Condon: I would be delighted, if I may. I wasn't going to offer it in evidence, solely for the reason I didn't know how to preserve it in evidence.

Judge Friendly: You may substitute a photograph, if you think it is necessary. I don't know whether it is.

Mr. Condon: May I have your indulgence to substitute the photograph at a later time, your Honor?

Judge Friendly: Yes.

By Mr. Condon:

Q. All right, Mr. Atkin. Will you now tell us—I think it is clear to all of us how this operation was done—will you now tell us what would be involved if you were to mark separately on this product the weight of the turkey and the weight of the stuffing?
[fol. 22] A. We couldn't do it because it's—

Mr. Kahaner: I object to that, your Honor. I don't know what he means by "involved."
Mr. Condon: I will rephrase it.
Mr. Kahaner: Is the witness going to testify—
Judge Friendly: He is rephrasing it.
Mr. Condon: I will rephrase the question.

Q. What changes would be entailed in your operation in order to permit you to mark the separate weight of the turkey and the stuffing and the whole of this stuffed turkey product?
A. The first thing, we couldn't because the Department of Agriculture won't give us approval.

Mr. Kahaner: I object and move to strike out the answer.
Judge Friendly: Yes, the answer may be stricken.
In answering the question, limit yourself for the time being to the physical operation. Mr. Condon will develop the other point later, I am sure.
The Witness: Yes.

A. Well, it would involve three—at least for us at our plant, it would involve about four scalers—
[fol. 23] Q. No, I am not concerned now with the people or the cost, or anything. I want to know what would you have to do.
A. We'd have to weigh the bird at least three times in order to do that, accomplish that.
Q. Where in the operation would you have to weigh the bird three times?
A. We would have to weigh it—before it was stuffed, we'd have to weigh it again after it was stuffed, and then we would have to weigh the giblets and make a computa-

tion to add that on to the bird, which would be—and then add the weight of the stuffing, giblets and dressing to come up with the total weight of the bird.

Judge Friendly: You have to have four—four weighing operations—three of the bird and one of the giblets. Is that right?

The Witness: One of the bird before it is stuffed and one after it is stuffed; then the weight of the giblets; then the total weight would be a computation.

Judge Friendly: It would be a computation?

The Witness: Of the three.

[fol. 24] Judge Friendly: The second and the third—

The Witness: Either way. As I say, it would be either way you arrive at the same—

Judge Wyatt: Well, how do you do it now?

The Witness: We make one weighing. We weigh the bird after it is bagged with the giblets and dressing.

Judge Wyatt: Now, in order to show the weight before stuffing, why wouldn't you have to weigh it only once, that is, once before you put the stuffing in and weigh it at the end of the operation, two weighs?

Judge Croake: And then subtract it.

The Witness: Well, I would have to know the weight of the giblets because the giblets don't always weigh the same and they still have to be weighed and taken off, added either to the weight of the bird after it is stuffed because they are separately packaged, and there wouldn't be any way that I know of at our operation to handle it until you get the bird in the bag.

Judge Wyatt: Mr. Condon, am I correct in supposing that what New York wants you to show is the total weight and separately the net weight of the turkey?

[fol. 25] Mr. Condon: Yes. Well, there is a litle confusion about that, but I think that is correct.

I would prefer the attorney general tell you exactly what New York requires. It is either that, the weight of the turkey and the whole, or the weight of the turkey, the stuffing and the whole.

Judge Wyatt: I am just not able to see why Mr. Atkin, by adding one thing to what he does, can not come out with the answer.

Mr. Condon: Mr. Atkin's point is that the giblets are properly part of the turkey, but they are not with the turkey prior to stuffing. They are not put into this package until after the turkey is put in the bag.

By Mr. Condon:

Q. It might be well, Mr. Atkin, if you would take Plaintiffs' Exhibit 3 for identification and show the Court where those giblets are placed in that package.

A. The giblets are included in a foil bag right here on the outside of the turkey, this exhibit.

Judge Wyatt: It is under the outside wrapping?

[fol. 26] The Witness: Yes, and it is on top—between the bird—laying on the top, at that point.

Judge Friendly: The weight of those varies?

The Witness: Yes, sir, they do vary.

By Mr. Condon:

Q. Mr. Atkin, do you run, in the course of your production of stuffed turkeys, do you run any tests on the amount of stuffing that is being put in turkeys?

A. Yes, our quality insurance man tries to follow it, does follow it and makes tests every—each horn, each hour, two tests an hour, for percentage of dressing going into the bird, and he does that by—at random.

In other words, he doesn't have it set up, comes to a certain time to take it because after all we want a fair operation.

He steps in sometime during the hour, or one of his technicians, takes the bird after it has been on the line and ready to go, just before it is sealed, takes it to the laboratory and removes the dressing and figures the percentage of dressing in that bird.

[fol. 27] Q. And do those tests indicate that the same size turkey will always take the same kind of stuffing?

A. They won't; it varies.

Mr. Kahaner: I object, your Honor. This seems to be hearsay evidence. He is trying to tell us what somebody else does.

Judge Friendly: I take it the witness is familiar with this.

Have you seen this operation?

The Witness: Oh, yes, I am superintendent and I do follow the quality insurance man in the plant.

Judge Friendly: Overruled. You may answer.

Q. You may answer. Do you remember the question?

A. Well—

Mr. Condon: Would you read it back to him, please.

(Question read.)

Q. The same amount of stuffing, I believe is the question.

A. No, the tests indicate there is quite a variance in the amount of stuffing that goes into a bird, whether it be small turkeys, which take a higher percentage as a rule, or whether it be a hen turkey—a tom turkey.

[fol. 28] There is quite a variance. Just like the conformation of people varies, there is a variation.

Q. You referred to this area, but let's go back to it. More specifically, will you tell me what the activities of the United States Department of Agriculture inspectors are in your plant? What do they do?

A. Well, the first inspection in May which I didn't—on the part of the previous—they do inspect, take a look at the birds, the live birds that's in the trucks, an ante-mortem inspection, to the extent if the bird don't look healthy they could be turned down and not used and as they look at it, the post-mortem inspection, where they examine the viscera of the bird, outside, inside, for disease or bruises or contamination, and they also run sanitary inspections.

Every morning one of them is there about a half an hour to an hour ahead of our operations on the sanitariness of the plant, looking at all phases of the machinery, the cleaning up, and then they follow the Cryovac bagging operation and stuffing operation.

[fol. 29] He goes in there, makes his inspection in there. I don't know if he goes there several times during the day. He doesn't have any set time to go in. Of course, the boys would be ready for him, but he makes drops unexpectedly into the stuffing room himself and Mr. Klein—he works as close with his inspector or grader at the end of the line and he is in there quite often looking the operation over, and with the one man they could do this.

The way it is now, they can make this inspection that way, and then they also—they check weighing. I don't know what the percentage is, but every hour or two they make check weighs of all of our birds as they come off the Cryovac line.

Q. How many Federal inspectors are there in your plant at Detroit Lakes?

A. There is three full-time, three men there all the time, and then there is two off-the-premises men—Dr. Noland and Dr. Westlake—who drop in twice of a morning as a rule and twice in the afternoon, and they are the veterinarians in charge.

Dr. Westlake is the inspector in charge, and Dr. Noland is his partner.

Q. Now, are there inspectors in your plant at all times [fol. 30] when you are operating?

A. There is.

Q. Well, now, suppose you are ready to open in the morning and the inspectors haven't arrived?

A. We don't start.

Q. You never operate when there are no inspectors in the plant?

A. No, sir.

Q. How many turkeys, Mr. Atkin, of all kinds do you process in your plant in a year, pounds, if you can give it to me?

A. In excess of 18 million pounds last year—I would say about 18,700,000 is about the best I can remember. It may be off a little bit, but in that neighborhood.

Q. Do you know how many pounds of stuffed turkeys you processed last year?

A. It would be a round figure. I could estimate. About a million pounds.

Judge Wyatt: You said 18 million pounds total.

The Witness: Total.

Judge Wyatt: And of the 18 million, one million is stuffed turkey?

The Witness: That's right.

[fol. 31] Mr. Condon: I have no further questions.

Judge Friendly: Cross-examination.

Cross examination.

By Mr. Kahaner:

Q. Mr. Atkin, will you tell us when the turkeys are brought to the plant of Swift, are they brought in coops, brought alive, is that it?

A. Our turkeys are brought in in trucks that are caged trucks. They are built especially for hauling live turkeys.

Q. I see.

A. There are layers, they are caged.

Q. And are they all of different weights?

A. The trucks?

Q. No, the turkeys when you buy them.

A. Yes, they are of different weights.

Q. And then when you slaughter the turkeys, at that time when they are brought in the inspectors are there from the Department of Agriculture to examine the birds to see if they are healthy, free from disease, is that it?

A. Yes.

Q. That's very important. And if they find any that are not so, they will discard them?

A. They will throw them back.

[fol. 32] Q. And then the turkeys are slaughtered thereafter, is that it, at one time?

A. I don't get your question. Are you asking about the ante-mortem inspection?

Q. Well, I am saying that these turkeys, when they come into your plant on trucks, or how they come in, they are examined by these—

A. Live, yes.

Q. Live.

A. Yes, he looks at them and if they are healthy in appearance he lets us process them.

Q. In other words, a superficial examination?

A. That's right.

Q. To see they don't look sick?

A. Yes.

Q. And then when that happens, if there are any sick, they will take them out of there, is that it, out of the—

A. Well, it never happened at our plant in Detroit Lakes. We haven't had live ones turned down, but I know it has happened.

Q. Not at your plant, but other plants?

A. I know it has happened in other plants I have been working at, but not at Detroit Lakes because we have very [fol. 33] close inspection on our buying.

Q. Are the turkeys bought from farmers in the vicinity? Is that how it works?

A. Yes.

Q. Then when you get the O.K. from the inspector, these turkeys are processed, killed and plucked?

A. Right.

Q. And during that process there are inspectors there, too, is that right?

A. Yes, sir.

Q. To see that after they are killed the turkeys are still healthy; in other words, they are opened up, the gizzards are examined?

A. Yes, post-mortem examination.

Q. Nobody is interested particularly in weight when the turkeys come in alive, or anything like that, neither you nor the inspectors, is that it?

A. Yes, I am interested in weight.

Q. Do you weigh the turkeys when they are brought in alive?

A. Yes, they are weighed at the city scales.

Q. Each one?

A. Each truck of turkeys.

Q. I am talking about the individual.

[fol. 34] A. The individual, no.

Q. You are not interested in the weight of any particular turkey and neither is the U. S. Government inspector?

A. That's right.

Q. They are interested in healthy turkeys. And then—

Judge Croake: The answer is yes?

The Witness: Yes, they are interested in healthy turkeys.

Q. And after they are slaughtered, the inspectors are still interested in seeing that those turkeys are healthy?

A. Right.

Q. And they go through minute investigation, make sure that there are no sick turkeys there and, as a matter of fact, the whole poultry inspection act is based on wholesomeness of the turkey, is that it?

Mr. Condon: I object, your Honor. This witness isn't qualified to testify about that.

Judge Friendly: I think you can ask as to what the inspectors do. I don't think the witness can tell us what the philosophy is.

Q. Well, the inspectors, anyway, are administering this [fol. 35] poultry inspection, aren't they?

A. Yes.

Q. They operate the federal poultry inspection and all they are interested in is wholesomeness from the time the turkeys come to the plant alive and at the time the turkeys are slaughtered and processed?

Mr. Condon: I object to that, your Honor. I don't think he is qualified to say what someone else did.

Judge Friendly: He can tell what they do. He doesn't have to know what is in their minds.

Q. Well, do you see how they look at the turkeys after they are killed?

A. Yes, sir.

Q. And they look in the turkey, they look in the gizzards and every part of the turkey to see that the turkey is free of some disease, is that right?

A. That's correct.

Q. And if they find any turkey that is suspicious, that turkey is discarded, is that right?

A. Correct.

Judge Wyatt: But I think the witness told us, if I am not mistaken, that they check the net weights at some point.

[fol. 36] The Witness: They do. The finished product.

Mr. Kahaner: They do that at the end of the process.

Judge Wyatt: Yes.

Mr. Kahaner: I am going now to the beginning of the process.

Q. Do you at the time that the turkeys are processed, do you weigh the individual turkeys?

A. When we are selecting birds for stuffing, we weigh, or have a competent man with a scale collecting birds of that particular size we need as near as possible, but you can't get it exact, that's for sure.

Q. Well, what kind of a leeway do you permit; in other words, you are looking, say, for five turkeys, approximately five, or eight, or seven, is that what it is, about on the same poundage?

A. Well, in the neighborhood, yes.

Q. And you are attempting to get these turkeys of almost a similar weight, give or take a few ounces, is that it?

A. No, give or take a couple of pounds.

Q. I see.

Judge Friendly: How does he do that: by visual inspec- [fol. 37] tion, or by putting them on a scale?

The Witness: Well, most of the time a man weighs a bird or two, it's a man used to handling it, and he will weigh a bird or two to see how he is judging and then he goes on from there, just for judgment, because it's not sold, it's just merely for sorting.

Q. In other words, he uses the weight to check up on himself, is that it?

A. Yes, to see that he is sorting them out right.

Judge Wyatt: He doesn't weigh each bird?

The Witness: No, sir.

Q. You mean, he might not know the difference between a five-pound, or seven-pound bird, something like that, is that it; he wants to make sure?

A. Yes, he wants to be sure he is within the range.

Q. Are you picking these birds for stuffing in the groups that weigh a certain weight, is that it?

A. What do you mean?

Q. When you pick these birds, when your man is there picking up the birds—

A. You mean, sorting the birds?

Q. Sorting the birds, you pick them for weight?

[fol. 38] A. Yes, as near as possible for a certain size, within about a two-pound range, give or take.

Q. What does he do: take a five-pound bird and put it aside in one batch and an eight-pound bird in another batch?

A. No, they just go into the same batch because he can't sort them that way. He sorts within a two-pound range, tries to sort them within a given range, within about a two-pound range.

Q. These birds, after they are slaughtered, do they come to him on some sort of assembly line?

A. Yes, on a chain conveyor.

Q. I beg your pardon?

A. On a chain conveyor.

Q. I see. And he picks these birds from this conveyor and—

A. No.

Q. What does he do?

A. They are dropped on a table where they are dressed and he is there and sorts out the bird he wants, as near as possible, so we won't have any undergrade going for rehandling at the stuffing line that the grader would have to rehandle there.

That's another thing he does at that point, more or less [fol. 39] sorting, just a sorting operation, size.

Q. Does he sort the turkeys from this conveyor just weighing a certain poundage, or does he take all the birds off the conveyor?

A. No, he doesn't take all the birds on the conveyor. He —just depending on what size we want to take. If we want to put up a six to ten-pound bird that day on stuffing, that's about the range it runs, two pounds either way—in other words, a six-pound bird, six to ten—eight pounds to six and eight to ten—takes them within that range, approximately. There will be some over, some under.

Q. And if the bird comes down weighing twelve or fourteen pounds, somebody else gets that?

A. That's right.

Q. He is just taking the birds away between six and ten pounds?

A. At a given size we want that day.

Q. Now, these birds are laying on a table, is that right?

A. Yes, conveyors—conveyor table.

Q. Conveyor table?

A. Right.

[fol. 40] Q. They are not frozen, or it still—what are the conditions in the plant? Is it air-conditioned, the plant? Is that a freezer type of operation that he is working in, or is this an ordinary type operation?

A. Well, it's a room, just an ordinary room under—the air is not air-conditioned; don't happen to need an air-conditioned room. Our plant is cool enough. But there is positive pressure on the room from filtered air brought in that is required by the Department of Agriculture.

Q. I see. So there is nothing special about this room to keep the birds at a certain temperature, it's an ordinary temperature, is that it?

A. No, we move them along as fast as possible to get them chilled quick.

Q. How long after your man takes them off the conveyor—he takes his six to ten-pound birds, eight pounds, he takes them off the conveyor, is that right?

A. Off the conveyor onto a table.

Q. Onto the table?

A. Yes.

Q. How long will they stay at the table?

A. Oh, I would say they're coming off at the rate of [fol. 41] about thirty a minute.

Q. And then what happens after he takes his birds off on his table? What happens to those birds?

A. The birds come off the conveyor table directly into ice slush for chilling.

Q. And this is a slush of—

A. Ice and water.

Q. And how long do they—

Judge Wyatt: Wait—excuse me—the birds he selects for stuffing, they don't go at that point?

The Witness: Yes, they go right into slush ice.

Judge Wyatt: What happens to the birds he doesn't select for stuffing?

The Witness: They go into another vat the other people are working at for regular production. They go into slush icewater.

Judge Wyatt: I see. But they are different vats?

The Witness: Yes.

Judge Wyatt: All right.

By Mr. Kahaner:

Q. How long do they stay in this iced water?

[fol. 42] A. Overnight as a rule.

Q. And these birds get waterlogged, don't they?

A. No.

Q. They don't?

A. No.

Q. There is no absorption of water?

A. There is tolerances prescribed by the Department of Agriculture. They run tests on that daily to see that there is not an excess amount of water.

Q. How much water does the turkey pick up after being there all day and all night?

A. Sir, I couldn't tell you, I don't know.

Q. You don't have any test on it?

A. No, the Department of Agriculture runs them and tells them the tolerances.

Q. That turkey will weigh much more than if it hadn't been laying in icewater all day and all night, wouldn't it?

A. There is an absorption, but it's a percentage. I couldn't tell you exactly.

Q. How much, ten per cent?

A. No, it would be under that because there are tolerances.

[fol. 43] Q. You say you know it is under ten, but you don't know for sure. Could it be more than ten?

A. No. Their tolerance is—

Q. What?

A. They have—

Q. What is their tolerance, if you do know or don't know?

A. I don't know. You will have—the Department of Agriculture man can give you that information. I don't recall the exact—

Q. You are not interested in knowing that?

A. Yes, sir, I am interested in knowing, but I don't recall what it is at the present time.

Q. Well, then, after this bird with its accretion by water —it has some extra water in its system now, the body, the meat has absorbed water after being waterlogged all day and night, is that it, it has some percentage of extra weight?

A. Yes, it has some percentage of extra weight.

Q. What happens after that?

A. After what?

Q. Well, after it lays there all day and all night in water, what happens to the turkey after that?

A. Well, it's graded.

[fol. 44] Q. It's what?

A. The grader works—when it goes to the stuffing department, the government grader checks it for grade. Nothing but A-grade stuff goes to the stuffing department. And it is hung on a line for draining. The neck skin is squeezed out for water. Then it's washed.

Q. You said it's graded into what, different—A, B and C, according to the type of bird?

A. Yes, but nothing but the A-bird goes to the stuffing department. The rest of the stuff goes back to the other operation where it will be packed as under-grade.

Q. In other words, for stuffing purposes, you use the best type of birds, is that right?

A. The best we can get.

Q. And then it's put on an assembly line again ready for stuffing, is that right?

A. Yes.

Q. And is anything done between that period and the time that the turkey is stuffed?

A. What do you mean "is there anything done"?

Q. Well, you said something about somebody squeezes water out of it?

[fol. 45] A. Well, it's hung on and when a man hangs—the grader, or his men working with him—they generally pull on the neck skin, which has been removed. They pull on the neck skin which permits draining and the bird is drained.

Oh, the drain line, I imagine—

Q. I don't want what you are imagining. What do you know about the process of getting the water out of the bird after it has laid there the whole day and night? What do you know personally that they do to drain this—

A. The drain—

Q. What?

A. We drain it on a line. We call it a draining line.

Q. What do you do, bring it along the line and a few drops drip down, is that it?

A. They hang down and the bird—the hanger hangs it on, straightens out the neck skin, squeezes it, sees that it's open, the cavity of the bird, goes down this line, this draining, oh, I would say about six or eight minutes.

Then it's washed, and in the meantime, while it's on the line, a girl checks it to see that there is no pin feathers or [fol. 46] anything like that, that has been overlooked.

Then it's washed. Then it's steamed, the body cavity sterilized, we call it. And then it—

Q. In other words, for this six or eight minutes it's going along a conveyor?

A. That's right.

Q. And whatever water drips out, drips out, is that it?

A. That's right.

Q. And there is no special effort made by any machinery to press, do anything to get any additional water out, is that it? Whatever drops down—

A. It drains out.

Q. —out on the conveyor belt, is out?

A. Yes.

Q. When it gets to this girl who does the stuffing—you say girls do the stuffing?

A. Yes.

Q. How do they stuff the bird?

A. We have—the first girl—it's taken off the line, passed to the girl, to the stuffers.

These girls are all wearing surgical gloves.

Q. Yes, I grant you that.

[fol. 47] A. These machines are little hoppers and the girl feeds it with a stainless steel scoop, feeds the stuffing into this little hopper, and then it's augered into the bird, and while it's being augered in, it automatically injects the percentage of water into the stuffing that's required.

Q. So that when the bird is ready for stuffing and comes right to this girl who has the actual job of stuffing the poultry, she doesn't know what this bird weighs, is that right?

A. No, she doesn't know what it weighs, no.

Q. All she has got is a cavity in front of her to be filled?

A. Yes, sir.

Q. Is that it?

A. Yes.

Q. And this stuffing is available to her. What does she do, take it with her gloves and stuff the bird with it?

A. Oh, it's on a machine, it's scooped into the hopper of the machine and it's augered into the cavity of the other birds by machinery.

Q. Is this something like a gun?

A. No.

[fol. 48] Q. Is it shot into the bird?

A. No, no.

Q. How is this thing—how is this stuffing put into the bird? I mean, is it a gentle tap, or does it go in with force? How is it done?

A. Well, our stuffing machine is a little auger and a little stainless steel pipe about two inches around—

Q. In circumference?

A. Circumference, and this water is injected, this auger —the bird is stuck on this auger, back into the bird.

The girl steps on the switch which activates the machine, opens the valve that lets the water into the dressing, and then just grabs it—the weight of the bird is holding it on—and pushes it off and she turns it into the body, the crop cavity the same way, and that's it.

Q. You mean she has got dry stuffing which is supposedly mixed with a certain amount of water before being stuffed, is that it?

A. The dry stuffing is mixed with water as it goes into the auger. The auger mixes the water in it as it is augered into the bird.

[fol. 49] Q. How much water or how much stuffing goes into this particular bird when the girl doesn't have the weight of the bird?

A. They stuff to appearance.

Q. What's that?

A. Just stuff to appearance. We don't know how much is—

Q. You stuff it, is that what you mean, as much as it will take?

A. To appearance, no.

Q. Whose appearance governs: yours or the inspector's? Who is supposed to—

A. Quality insurance man. We have a quality insurance.

Q. You have a quality insurance man?

A. Yes, sir.

Q. And he is your employee?

A. Yes, sir, he is Swift & Co.'s employee. He doesn't work for me.

Q. You work for Swift & Co.?

A. Yes, sir, but under a different division.

Q. I see. And this man would naturally like to see as much stuffing in a bird as would be possible, wouldn't he?

[fol. 50] A. I don't think so.

Q. He doesn't want less stuffing than the bird would ordinarily take?

A. I don't know what he wants, but he wants the bird to look nice.

Q. Nice, round, fat, look more than it actually is, is that right?

A. No, as natural in appearance as possible.

Q. He wants to improve on the bird's natural appearance?

A. No.

Judge Friendly: I think we have the point, Mr. Kahaner.

Q. So actually the bird will take as much stuffing as the girl wants to give it?

A. The what?

Q. The bird will take as much as the girl, this girl who is applying this stuffing into the bird, wants to give it? Can she stop it any way, or is it automatic?

A. It's grabbed—the way the bird is, she holds the bird lightly on here and it's pushed off and whenever it's filled, she stops.

Q. How does she know when it's filled?

A. Shuts off the end of the stuffing.

[fol. 51] Q. Automatic?

A. Yes, holds it lightly and sets it like that.

Q. In other words, it is governed by the machine itself, if you want more stuffing in the bird—

A. No.

Q. —you would adjust the machine to put it in; if you want less, you would adjust it for less?

A. No, the girl is the operator. The girl is a trained operator. She puts the birds on the stuffing horn, holds it lightly, and as the machine pushes it off, she holds it lightly and it comes off, lifts off the turkey.

Q. How do you know she holds it lightly?

A. In other words—

Q. What's that?

A. If she would hold it up tight, she would pack it. We don't want our stuffing packed in the bird.

Q. Oh, there is a possibility of packing the bird with stuffing if she holds it tight?

A. Yes.

Q. So it depends on the girl, whether she holds it light or tight, as to how much stuffing that bird gets?

A. Yes.

[fol. 52] Q. Are you interested in seeing that the bird is fully stuffed?

A. Yes, to a nice appearance and looks nice and plenty of stuffing, but not too much.

Q. I see. What—how much stuffing would go into a five-pound bird?

A. Oh, you could go around 16 to 21 per cent of the weight. 21 per cent average, I imagine, for that size bird.

Q. About a little over a pound of stuffing will go into a five-pound bird, is that it?

A. 21 per cent of the body weight, yes.

Q. And is that machine regulated so that a five-pound bird will take a little over a pound of stuffing?

A. No, the girls—the operators are trained. They are the ones that regulate the stuffing.

Q. So, in other words, you have to leave it to the girls to determine that?

A. They and the quality insurance man, who takes a sample every fifteen minutes, to see how they're coming along on the amount of stuffing and moisture analysis.

Q. After the bird has been stuffed, he takes it off the [fol. 53] assembly line and brings it to his office?

A. Takes it into a laboratory.

Q. Why doesn't he take it in to weigh the stuffing, if you say that is all he is interested in?

A. What?

Q. Is he interested in the quality or the weight of the stuffing?

A. He is interested in the quality of the stuffing, bacteriological condition of the stuffing, and the weight of the stuffing in the bird and the moisture in the stuffing.

Q. So he has got to do all that: the quality, the bacteria?

A. Yes.

Q. Has he a scale?

A. Yes.

Q. Did you ever see him do that?

A. Yes.

Q. When was the last time you saw him do that?

A. I think we operated last in—well, this fall. I don't know the last time we operated, but I think it was in January we operated, I believe, the last time.

Q. That is the last time you saw him do that?

[fol. 53a] A. Yes, that's the last time we stuffed turkeys.

Q. And you watched this, you were there all the time and watched?

A. Not all the time. I watched him make these tests during the day. I have the whole plant to look after and I watch each department.

Q. You watch every part of this test, is that it?

A. Sometimes during the day, yes.

[fol. 54] Q. What are you, checking up on this man?

A. No, I am interested in what's being done.

Q. If you see—

A. The quality of the bird.

Q. If you see it once, you know what is being done. How many times do you have to see it?

A. No particular reason other than interest in the quality of the operation.

Judge Wyatt: Mr. Atkin, tell me, do you stuff every turkey that meets your specifications, or is the number of turkeys that you stuff determined by demand? Which is it?

The Witness: Well, I imagine that's in the sales end of the business. We are usually told in the operating—Swift—the manager of the plant generally tells me this: he wants so many head stuffed and have these birds by special sizes, as near as possible, so and so want the turkeys, get that order, and as a rule it will be continued because somebody else wants another and we will keep on going.

Judge Wyatt: But I am not to conclude from the 18 million and one million pound figures that you stuffed all the turkeys that were acceptable to you?

[fol. 55] The Witness: No, no, no.

Judge Wyatt: All right.

Go ahead.

Q. Well, did this inspector of yours ever find that there was more stuffing than was permitted in a certain turkey?

A. Yes, he has found that.

Q. How much did it vary? Instead of a pound of stuffing to a 5-pound turkey, how much was it over?

A. I don't recall. I couldn't tell you the exact weight because I couldn't tell.

Q. Was it sufficient for him to go back and tell the girls they weren't doing the job right?

A. Yes, and make corrections in his—in the procedure.

Q. In other words, you can manipulate this machine to put in stuffing, more or less?

A. The machine is constant, no, but the girl could be—could do it.

Q. You mean, she is holding it tighter than she should?

A. She could be holding it together.

Q. So there is a possibility that the girls—

A. Possible, yes.

[fol. 56] Q. They don't do their jobs the way they should, is that it?

A. There's times. They are human.

Q. Now, then, you have the turkeys stuffed, well stuffed or nicely stuffed, and then the bird is weighed?

A. No, the next thing, the bird is checked to see that there is no crumb left on the outside of the bird that might detract from its appearance and the girl looks at the conformation of the bird and if it should be overstuffed, another inspector—our own house people—if it looks like it's overstuffed, why, it's passed back for correction, and if a bird is satisfactory at this point, why, then, it's washed off, rinsed off to see if there is any crumb on it, and passed on to people who put it in the bag and then from that girl it's passed on to the girl who puts these giblets down between the wings and then evacuated and sealed on the end and then it's weighed.

Q. In other words, even after your safety inspector checks these things, the bird still can be overstuffed, you have another inspector checking that, is that it?

A. Yes.

[fol. 57] Q. And could a bird be overstuffed without showing it?

A. I don't know how it could.

Q. Well, you say you can only tell it is overstuffed by the looks of it?

A. That's right.

Q. In other words, if it will be bulgy?

A. Yes.

Q. Could there be more than the amount of the stuffing without a bulge?

A. I don't think so.

Q. Suppose a bird of five pounds was supposed to have a pound of stuffing and suppose it has a pound and a quarter or three-eighths, do you think that difference of a quarter of a pound is going to bulge out the bird?

A. No, I don't think it would.

Q. So there could be everstuffing without being shown?

A. No, I said the 21 per cent is the average.

Q. How about 25 per cent?

A. There would be some chances some would have 25 per cent.

Q. You couldn't tell that from looking at the bird?

[fol. 58] A. No.

Q. I mean, when you are telling about overstuffed, you probably have a—instead of a pound stuffing, it might be two or two and a half pounds stuffing could squeeze into that bird, is that right? That you could see from the contour of the bird, it would be stuffing a 5-pound bird out of proportion?

A. No, I don't think you could put that much more in without telling.

Q. You couldn't put in an extra pound?

A. Without telling, without noticing it on the bird.

Q. How about with a quarter of a pound, you could?

A. Chances are you could.

Q. How about three-eights of a pound?

A. I wouldn't know exactly.

Q. How do you know an extra pound of stuffing would make the bird look out of proportion?

A. Well, if a pound of stuffing is for a normal conformation and you had another pound, I am sure twice as much would show.

Q. Are you sure or are you guessing?

[fol. 59] A. I am sure.

Q. You just said before you wouldn't tie yourself down to it exactly, but now you are sure of the extra pound?

A. Extra pound, yes.

Q. Not three-quarters of a pound?

A. I don't know because getting down to small weights I—

Q. You don't know about three-quarters of a pound, but you are sure about a pound?

A. I think it would show, yes.

Q. You do know about three-quarters of a pound, is that it?

A. That's what I think.

Q. So it could happen that three-quarters of a pound could not show on a bird?

A. I don't think—I think it would show.

Q. I don't want to go over this again. Are you sure—

Judge Friendly: It is clear the witness has given his best judgment, that he thinks it would, and you are not going to—

Q. Do you know Mr. Maidlow?
A. Yes.
[fol. 60] Q. Was he part of Swift & Company?
A. Yes.
Q. Suppose I were to tell you that he was examined before trial and he was examined as an expert and knew all about the operations of Swift & Company and in his examination he said he saw the girls take the bird and there was some kind of an apparatus that resembled a gun and this was filled, this gun shot the stuffing into the bird.

Mr. Condon: I am going to object.

Q. (Continuing) As much as it would take.

Mr. Condon: I object to the question, if I may, because of the characterization of Mr. Maidlow as an expert. He was examined as a witness, in response to a notice. The notice didn't ask for an expert witness and he wasn't offered as one and he isn't one.
Judge Friendly: Well, the record will show.
What is his official title, Mr. Kahaner?
Mr. Condon: Mr. Maidlow is the district poultry man for the New York sales territory of Swift & Company.
Judge Friendly: You can ask your question, Mr. Kahaner, without characterizing Mr. Maidlow. Or why don't [fol. 61] you refer to the page of the deposition that you are interested in?
Mr. Kahaner: On page 5 and 6, your Honor.
Mr. Maidlow said all he saw there was one girl working. "I don't know whether it was one girl. I mean, the same methods were used, as far as I could see."
The question was:

"Would you say the amount of stuffing that went into a 5-pound bird was the same as went into a 14-pound bird?"
He said: "No, sir."
I asked him: "How would you know?"
He said: "There is no way to tell because the turkey is stuffed."

I said: "As you watched this girl stuffing the bird, did you notice her spend more time stuffing the bird with a larger turkey than with a lighter weight turkey?

"A. Only stuffing it until it was full of stuffing, regardless of the size of the bird. They were just stuffed, that's all I would say.

"Q. In other words, it was up to the girl to determine the amount of stuffing in the bird?"

[fol. 62] He answered: "The interior was filled with stuffing."

Judge Croake: What page is that?

Mr. Kahaner: Page 6.

By Mr. Kahaner:

Q. Would that be a description, a fair description of what happened in the stuffing of a bird, of a turkey at your plant?

A. State your question again, please.

Q. Is that a fair description of what Mr. Maidlow said?

Judge Friendly: It is obviously what Mr. Maidlow said. You want to know whether the witness thinks it is a good description.

Q. Is it a fair description of what happens at your plant?

A. No, I don't think it is.

Q. Would you say he didn't know what he was talking about?

A. No, I wouldn't say he didn't know what he was talking about. Maybe he is not too familiar with stuffing operations.

Q. Well, he came here as a witness on the part of Swift to tell us about stuffing. You say he doesn't know his job, is [fol. 63] that it?

A. I am not saying he doesn't know his job, but the description—that isn't the way I would—the description is—

Read that again, if you may.

Q. It says in one place "It is up to the girl to determine the amount of stuffing in the bird."

Judge Croake: Are you trying to have this witness pass judgment on the testimony of another witness, whether he disagrees with it?

Mr. Kahaner: Well, I want to find out whether Mr. Maidlow's testimony as a witness is the correct one, or is Mr. Atkin's. They seem to be diverging as to what actually happens in the stuffing.

Judge Friendly: I don't see where there is a divergence. Obviously Mr. Atkin is much more detailed, but if there is some inconsistency perhaps you want to point it out more clearly because I don't detect it at the moment.

Q. At the time, after the stuffing of the poultry, you say that they are put on a scale and weighed after the giblets are put in and there is one weighing, is that it?

A. One weighing, yes, sir.

[fol. 64] Q. Did you ever make an attempt to have two weighings?

A. No, sir, I didn't.

Mr. Condon: Keep your voice up, please.

Q. Louder.

A. No, I never did.

Q. How long have you been in your present position with Swift?

A. As superintendent for 17 years.

Q. How long have they been stuffing turkeys?

A. If my recollection serves me right, I think we started in 1955.

Q. And that was the method, the method you described has been the same method since 1955?

A. With some improvements of machinery and equipment.

Q. There was never any question about having a bird weighed prior to stuffing?

A. No, not that I know of.

Q. Nobody ever discussed it with you?

A. You mean—

Q. I mean, discussed having both weights on the bird.

A. At the plant level?

[fol. 65] Q. Yes.

A. No.

Q. In other words, you don't know of any attempt by Swift & Company to actually go and experiment with two weights on the bird?

A. No, I know of none.

Q. They never discussed it with you?

A. Other than since I have been—came here, I heard this case, this is the first.

Q. In other words, prior to hearing about this case, did Swift & Company ever ask you to experiment so that they could see how this two-weight business could work out?

A. No.

Q. How much time expires from the time the bird goes on the assembly line, after it is put in this brine for a day and night, comes out the next day, from the time it's on this conveyor until the time it actually is frozen?

A. From the time it hangs at the line, the point it comes out to be chilled?

Q. Yes, that's it. How much time elapses before this turkey is actually frozen?

Judge Friendly: You mean, before it gets into the [fol. 66] freezer?

Mr. Kahaner: Yes, before it gets into the freezer, before it is actually frozen.

A. I would have to give you the approximate time because I don't have it stopwatched to an exact time.

I would say 25 to 30 minutes from the time it's hung on the line until it goes into our liquid freeze and it's in the liquid freeze approximately 30 minutes, so it would be about an hour from the time it's hung on the line until it comes out with a good hard frozen shell on it about three-quarters of an inch deep.

Q. Before it goes into the liquid freeze, it is actually exposed to the elements about 30 minutes?

A. Yes, in that neighborhood.

Q. How long does it take to weigh the bird after it finishes the process you just described?

A. Well, one scaler will handle, oh, about 200, 300 birds an hour.

Q. 200. You're a fast mathematician. Ordinarily what would that be, about three birds a minute or more? About that, is that right? It would be approximately around three birds a minute, a little more or less?

[fol. 67] A. That's right.

Q. I think my arithmetic—

Judge Friendly: Perfect.

Judge Wyatt: Does he weigh the birds after they have been frozen?

The Witness: No, sir, the birds are weighed before they are frozen.

Judge Wyatt: Just before they go into the liquid—

The Witness: Into the spray tank, this CRYOVAC bag shrinks, and just before they go into that they are weighed at that point.

Q. So, Mr. Atkin, if the weighing process is three birds a minute, it means each bird takes about a third of a minute, so if there had to be another weighing of this bird before it is stuffed, it would take about the same time, in other words, a weigher could do three birds in a minute?

A. Yes, that's about right.

Q. Would you say anything could happen to that bird in the extra time it took to weigh that turkey?

A. What do you mean "could anything happen"?

Q. I mean, could deterioration set in?

[fol. 68] A. Well, any time, any additional handling is a risk—

Q. I mean—

A. —increases the risk of contamination.

Q. It's no risk to keep these birds for 30 minutes?

A. That's right.

Q. But this one-third of a minute extra could be the risk?

A. Well, it's just an additional risk. There is a risk all the time in handling food and packages.

Q. With the one weighing, how many birds are rejected because of deterioration? I am talking about before stuffing, in that half hour.

A. None that I know of.

Q. None?

A. No, there is bacteriological tests made by swabbing the cavity of the birds. To date, this past season we have had no rejections at that point.

Q. There are no rejections after the birds are out in the open for 30 minutes, you haven't had one rejection for how many—say, within the last year?

A. Last year we didn't, no.

Judge Croake: Mr. Kahaner, when the weight is indi- [fol. 69] cated on the specific bird, the individual bird, how is it put on after this scaler weighs it?

Mr. Kahaner: All right.

Q. Prior to the bird being frozen, you say it's put in this bag and then weighed with the giblets and the stuffing?

A. Yes.

Judge Friendly: And the bag on it?

The Witness: The bag on it, and sealed.

Q. Sealed and with the stuffing and the giblets and everything, weighed, and actually comes out—

A. Yes, that process goes through the shrink tank and the bag does shrink and then it's frozen.

Q. Who puts the weight on this?

A. The scaler.

Q. As the bird is weighed, has this scaler got a crayon or ink that marks the bird?

A. Indelible—

Q. Beg your pardon?

A. They use an approved ink pencil or pen to write the weight of the bird on the bird.

Judge Wyatt: On the flesh of the bird, you mean?

The Witness: On the bag.

[fol. 70] Judge Friendly: How does he allow for the weight of the bag?

The Witness: The scale is set for an ounce and a half, we set it for an ounce and a half tare weight.

Judge Wyatt: He writes on the plastic surface?

The Witness: Yes, sir, there is a spot on there.

Q. In other words, if there is a larger turkey, then the bag is more than an ounce and a half, is that it?

A. Yes, it depends on the size of the turkey.

Q. In other words, he does this subtraction as soon as he weighs the bird?

A. He does it, takes it off, the weight of the bird because, well, say, a 6-pound or 8-pound bird takes an 11 by 18 size bag, we call it, and you get one over 10 pounds, it would take a 12 by 19 size bag, and people are familiar with the size of these bags, they allow different tare weights for it.

Q. In other words, he is familiar with it, he knows just how to figure it, he deducts from the amount?

A. Scale that much short—I mean, as far as that's con- [fol. 71] cerned—

Q. He puts that right onto the bag in whatever, waterproof crayon, or something?

A. Waterproof ink, pencil or crayon, screws—

Q. Then what happens? How does it get onto the package itself? Is this the way, this bird here that's marked for identification—

Judge Croake: Hold it up, will you please.

Mr. Kahaner: This is marked here Plaintiffs' Exhibit 3 for identification, marked 7 pounds 2 ounces in blue ink.

The Witness: That's right.

Q. Is that what the final weighing—

A. That's right.

Q. That's put right on that way?

Judge Wyatt: Let's take a look at it. I can't see it. Where is the 7?

Mr. Kahaner: There it is, 7 and 2.

Judge Wyatt: And this is labeled, Mr. Atkin, on the outside? It looks as if it is written directly on the label.

The Witness: Written on the label, written right on the CRYOVAC bag.

Judge Wyatt: There is a place there?

[fol. 72] The Witness: Yes, sir.

Judge Wyatt: Is specially prepared?

The Witness: Yes, sir.

Q. After that weight is put on, the bird is frozen?

A. The bag is shrunk, goes through the shrink tank and goes into the liquid freeze and frozen.

Q. And that's the weight that stays on until the bird is sold?

A. Yes, until sold.

Judge Wyatt: Sold at retail?

Mr. Kahaner: Sold at retail.

Q. Do you know whether Swift has many retail stores in New York?

A. To my knowledge, Swift has no retail stores.

Q. They sell these birds to wholesalers, is that it?

A. What do you mean?

Q. I mean, when these birds—who buys these birds from Swift?

A. Well, the chain stores and people like that. They are shipped to our sales unit like Mr. Maidlow here and he sells them out to some others, to retailers. I don't know to whom they are sold.

[fol. 73] Q. And you usually do stuff these birds at particular times of the year?

A. Yes.

Q. Do you have a heavy demand, is that it?

A. Yes.

Q. Around Thanksgiving and Christmas?

A. Before the Thanksgiving—

Q. Before?

A. Yes, I would say along in October when the stuffing operation takes place.

Q. You are not doing any stuffing at the moment, are you?

A. No, sir, we are not.

Q. No demand for it?

A. No, sir.

Q. Actually it's a holiday bird, is that it?

A. It seems to be more demand at that time of the year.

Q. You sell turkeys all through the year, you sell 18 million pounds of turkey a year, don't you?

A. I have nothing to do with the sales. I am merely in the processing end of the business.

Q. You did say that there is 18 million pounds sold?

[fol. 74] A. Processed.

Q. There is one million pounds of stuffing?

A. Approximately.

Q. Actually most of the turkey that you do sell is unstuffed?

A. That's right.

Q. And that's sold all during the year?

A. Yes.

Q. While one million pounds is concentrated on a holiday, is that it, on a specific—

A. No, it's sold the year round.

Q. You don't process them all year round, is that it?

A. If the stocks would get low, we would be asked to start up the stuffing operation. It has happened.

Judge Friendly: Are you going to have much more, Mr. Kahaner? I think the reporter would like a recess.

Q. I just wanted to know, Mr. Atkin, are you familiar with the process of the shipping, how it's shipped into New York, or any other state?

A. Yes, we ship in refrigerated cars or trucks. There is refrigerated rail cars or trucks that will carry zero or lower temperatures.

[fol. 75] Q. And how are these turkeys packed after they are taken out of the freezer? Are they put in a shipping box or container?

A. They come out of our liquid freezer, they are packed in cardboard cases that have holes in the sides of them and they are packed with the lids off, slats between each layer, and put into our freezers 18 to 24 hours before they are moved out.

Then they are moved out into the storage department, into a storage house where it's 10 below or better until they are ready to be shipped.

Q. And these turkeys, stuffed turkeys, are shipped to your different sales agents with or without an order, is that it?

A. With what?

Q. With or without an order; in other words, do you ship them the birds and tell them to sell them?

A. I don't ship—I only ship on orders. Everything that goes out of our plant has to go out on an order and what this manager has in the way of sales, I don't know, I am not familiar with that.

Q. Whatever the manager tells you to ship, you ship?

A. That's right.

[fol. 76] Q. And it's his headache to sell it, is that right?

A. I would think it would be sold before he ships it. I don't know whether he sells on consignment or not. It's not my business, that part of it.

Q. Well, has he got a place to store these turkeys when they come in to New York?

A. I don't know. Mr. Maidlow was the New York poultry man. I don't know. We ship them to storage houses—

Q. You are not familiar with what happens to the stuffed turkeys after they leave your plant?

A. No, sir, I don't know what happens to them.

Mr. Kahaner: All right, that is all.

Judge Friendly: We will take a five-minute recess.

(Recess.)

Judge Friendly: Gentlemen, we have been discussing our schedule a little bit.

When we had this case set for this afternoon, I don't think we realized we were going to be involved in so much evidence. Some of us have commitments for the next couple of days that will get in our way, in the way of proceeding continuously, and it seems the best thing to do is, after we adjourn this afternoon, to adjourn to Tuesday [fol. 77] morning and then hope we can finish it later on Tuesday, or at the latest on Wednesday.

So let's finish with Mr. Atkin.

I gather there is another out-of-town witness from Armour.

Mr. Condon: Maybe we can get through with him this afternoon. We will do the best we can.

Judge Friendly: Fine.

Do you have anything further? Do you have any further questions?

Mr. Kahaner: Yes, I just have one question—one or two of Mr. Atkin.

By Mr. Kahaner:

Q. Mr. Atkin, I believe in reply to Judge Croake as to how many weighings would be necessary to comply with New York State law, you said you had to have a separate weighing for the bird before it was stuffed. Did you say three weighings would be required?

A. There would be three weighings, I would think that would have to be made, yes. I don't know how we could do it otherwise.

Q. Do you know what the New York State law requires? [fol. 78] A. No.

Q. In other words, if the New York State law says they want the net weight of the turkey, which is the turkey itself, and the total net weight of the bird, including the giblets and the stuffing, how many weighings would be necessary?

A. What is it now?

Q. If the New York—

Judge Croake: Let him read the question.

(Question read.)

A. Well, we'd have to weigh the bird—the way I take it —we'd have to weigh the bird before it's stuffed and then to determine how much dressing there is, we'd have—

Q. Wait a minute now. The law says that the net weight of the turkey and the total net weight, that's all it says, which means that the total—after you set forth the net weight of the turkey, you can put the total net weight of the bird, which includes the stuffing and the giblets. How many weighings would be necessary?

A. Well, two weighings that way, on that basis, understanding on that basis.

Judge Wyatt: One other than the weighing that Mr. [fol. 79] Atkin talked about.

Mr. Kahaner: That's right.

Q. You don't need three weighings, just two, an extra weighing, it would be an extra process, is that it? There would be one extra weighing?

A. To determine—

Q. To determine the weight of the bird prior to the stuffing, you would have to weigh it once?

A. Yes.

Q. And then you do the same thing as you do later?

A. That's right.

Q. So, in other words, that would be three birds in a minute would be the extra time involved, is that it?

A. Yes.

Mr. Kahaner: Thank you.

Judge Wyatt: The last answer of the witness was "Yes."

Redirect examination.

By Mr. Condon:

Q. Mr. Atkin, are the giblets part of the turkey?

A. Yes.

Q. Part of the net weight of the turkey?

A. Yes.

Q. Irrespective of what any law requires, if you want [fol. 80] to show the net weight of a turkey on a stuffed turkey package, how many times do you have to weigh it?

Mr. Kahaner: I object to that, if your Honor please. I don't know whether it is material. We are talking about a New York State law.

Judge Friendly: Nobody knows what the law means.

Mr. Kahaner: Before anything is discussed, I would like counsel to be specific. We are discussing—

Mr. Condon: I am not going to ask the witness about the New York State law. He is not a New York lawyer. He is a turkey processor.

Judge Friendly: Whether the New York State law involves the net weight of meat, poultry or fish to be sold or offered for sale as food at retail by net weight only, now, if that means net weight of the bird ex giblets, you need only two weighings; if it means only three weighings of the bird ex giblets, you need three weighings.

Isn't it as simple as that?

Mr. Kahaner: Yes, your Honor, but they have an interpretation. Defendant's interpretation of that section and his interpretation is two weighings.

[fol. 81] Judge Friendly: Well—

Mr. Kahaner: That's all we are interested in, is what New York State requires.

Mr. Condon: This is the first time that I heard that New York State requires that the giblets not be included in the weight of the turkey. This is new to me.

Judge Friendly: Until we know what New York State requires, I think we better just let the witness state the facts and later on we can find out what it required.

By Mr. Condon:

Q. Mr. Atkin, we were talking a moment ago before the recess about the extra time involved in additional weighing or weights.

Now, if the concern that you express from a sanitary standpoint, is that concern involved with deterioration of the bird?

Mr. Kahaner: I object to that, if your Honor please.

Mr. Condon: I am just using your word, Mr. Kahaner.

Judge Friendly: What's the objection?

Mr. Kahaner: I don't know what that means. Is it his [fol. 82] concern we are talking about or the U. S. inspectors' concern?

Judge Friendly: Will you rephrase your question.

Q. In the additional few seconds involved in an added weighing, is there danger of deterioration of the turkey?

Mr. Kahaner: I object to that. I don't think the witness is an expert on that.

Judge Friendly: Overruled. You may answer.

A. I don't think the point of deterioration so much as contamination might be involved.

Judge Friendly: Why would that be, Mr. Atkin, if the weigher had rubber gloves, and so on?

The Witness: Just the possibility of contamination. Any time you handle any food product—

Judge Friendly: You regard it as a serious possibility?

The Witness: No, not serious, but it could be possible.

Judge Friendly: Anything further?

Mr. Condon: I have no further questions of Mr. Atkin.

[fol. 83] Judge Friendly: Anything further, Mr. Kahaner?

Mr. Kahaner: No, sir.

Judge Friendly: You are excused, Mr. Atkin. I thank you.

(Witness excused.)

Judge Friendly: Next witness.

Mr. Condon: Mr. Posegate.

Russell Posegate, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination

By Mr. Condon:

Q. Mr. Posegate, by whom are you employed?

A. Armour & Company.

Q. What position?

A. I am supervisor of poultry processing.

Q. Where do you have your office?

A. Chicago, Illinois.

Q. And in that position, what are your responsibilities?

A. I work with the establishing of and maintaining and enforcing quality control procedures and production techniques, processes and costs.

Q. Of what product, sir?

[fol. 84] A. Poultry and egg products.

Q. And in that connection do you have responsibility with respect to turkeys?

A. Yes.

Q. And with respect to stuffed turkeys?

A. Yes.

Q. Where does Armour & Company process stuffed turkeys?

A. Turlock, California and Barron, Wisconsin.

Q. How long has Armour & Company been in the stuffed turkey business?

A. Nine years.

Q. Since 1955?

A. Right.

Q. Did you have any responsibility with respect to stuffed turkeys at the time that Armour & Company went into this business?

A. Yes.

Q. Specifically, did you have any connection with the establishment of the processes in the two plants which you named?

A. Yes, directly.

Q. What connection did you have there?

A. My responsibility is to set up production methods, [fol. 85] quality control procedures, and enforce these procedures.

Also I have charge and am responsible for the costs of production.

Q. Did you establish the procedures that are used at Turlock and Barron, Wisconsin?

A. Yes.

Q. Were you present at those plants when the procedures were established?

A. Yes, I was.

Q. Mr. Posegate, you have heard Mr. Atkin's testimony, have you not?

A. Yes.

Q. And with respect to the receipt of live poultry and dressing and evisceration and chilling, is that operation substantially similar in the Armour plants as Mr. Atkin described in his plant?

A. Yes.

Q. So that if we then would start at the beginning of the stuffing operation—by the way, before I go on, where would the stuffed turkeys offered for sale by Armour & Company in the New York area originate?

A. Barron, Wisconsin.

Q. All right, fine. So let's confine ourselves to Barron, [fol. 86] Wisconsin, in answering the next series of questions.

Would you describe the stuffing operations and procedures and operation from the time your turkeys come out of these chill tanks preparatory to stuffing?

A. The turkeys which have been graded U.S.D.A. Grade A are placed on a drain line. This drain line is an overhead conveyor having special equipment for holding the bird erect for drainage so that all free moisture is drained from the bird which takes about 18 to 20 minutes prior to the bird being stuffed.

Now, the stuffing is mixed in a mixture. It is mixed three to four minutes.

The stuffing consists of Pepperidge Farms dried bread, water, vegetable oil and, of course, the incorporated spices in the dressing.

This is placed in the birds with an apparatus known as a Moyno pump which is a food type pump designed not to break up particles or to put excess pressure on products pumped to this system.

The bird is placed over the stainless steel pipe emanating from the pump. The pump is controlled by a foot-operated electric clutch type switch which aids in starting [fol. 87] and stopping it quickly.

So once the amount of dressing that is put in the bird is reached, the pump will stop without exuding excess dressing on to the table or other equipment.

The bird is filled by holding it and the dressing moving the bird away to the point where we know the body cavity is filled.

We aim for all body cavities to be filled, but without excess pressure.

After these body cavities are filled, the bird is placed on a belt conveyor. It's a white rubber belt that goes down the center of the table and it goes from there to girls who re-examine the body cavity at the abdominal opening to take and remove—in fact, they cut back some of the stuffing that was left by the pump pipe.

We do this so that we will have a place to place the giblets between the legs and into—starting into the abdominal cavity.

This limits the amount of stuffing that we can have exuding from the abdominal cavity.

After we get through with this, we truss the birds with a string which ties the wings down and also holds the legs [fol. 88] in position.

We do not bark-truss, as is commonly known in the trade, when the legs are inserted in the abdominal strap.

After this is done we then move to the girls or the workers who have pans of dressing. This dressing is put in the crop cavity, in layman's language, and it is filled till the contour of the bird is normal.

If this was not filled, this crop cavity would be indented and detract from the appearance of the bird.

After the stuffing has been completed, the bird moves on to the CRYOVAC application station. Bags are slipped over each bird. The birds are put on a vacuum apparatus, air removed; they are slipped, sealed, they are weighed. The weight is marked on the bag.

The bag goes through the shrinker. From the shrinker, they go into packages. From packages into an air blast freezer.

Q. Let me see if I understand this. Do you add the moisture—

[fol. 89] A. We add the moisture—

Q. —to your stuffing before it goes into this?

A. Yes, we do.

Q. Does it go in automatically?

A. Measured amount, exact amount.

Judge Wyatt: Mr. Posegate, what is the object of putting the birds in this tank which somebody called slush ice?

The Witness: Slush ice.

Judge Wyatt: What is the object of that?

The Witness: That is a common method of chilling poultry, all types of poultry in every poultry in the United States, whether it's chickens, turkeys, or what.

Judge Wyatt: You mean to make it easy to work with?

The Witness: No, to make the animal, immediately after the bird is stuffed—when it's slaughtered it's about 102 degrees, and to protect it, keep it, it is necessary that we freeze it rapidly, and if we don't cool it, we have a bird that is dried up, looks terrible, because the epidermis is removed in today's process.

We used to leave the epidermis on poultry which re- [fol. 90] quired a lot of people, but today it is all removed and so, therefore, our bird has skin removed.

Mr. Condon: I will ask that this be marked for identification.

(Plaintiffs' Exhibit 4 marked for identification.)

Judge Wyatt: This is going to be an Armour turkey?

Mr. Condon: This is an Armour turkey, yes, sir.

By Mr. Condon:

Q. I will hand you Plaintiffs' Exhibit 4 for identification and ask you to tell us what it is.

A. It's Armour Star stuffed junior young turkey.

Q. Can you tell me where that was processed?

A. Packed at plant P-190, which is Barron, Wisconsin.

Q. Now, will you show us on that package where Armour & Company places the giblets.

A. Under this tag between the legs is the foil-wrapped package of giblets.

The giblets consist of heart, gizzard and liver; no neck. [fol. 91] The neck is not included with this bird.

That package is under there displacing that amount of dressing.

This tag over there, is, of course, the cooking recipe, so when she removes it she has this for her instructions, how to prepare it.

Q. And that location of the giblet cavity—of the giblets, rather, is that over the abdominal cavity?

A. It's partially in the abdominal cavity. The end is inserted slightly. That's why I told you that we had removed some dressing.

Q. Where then is the dressing in the crop cavity?

A. The dressing in the crop cavity is in this neck skin which you can see here was put back, this bird, the dressing is put in here with a spoon. This is pulled back and only enough dressing is put in there to keep the natural contour of the bird.

We have to do that because if we put in more than we should, if we would have a bulge there, this would break and pop out in the roasting process.

If we put too much stuffing in the bird itself, this bone will come up out when cooked, so we are limited—

[fol. 92] Judge Croake: It doesn't have to be cooked in the CRYOVAC bag?

The Witness: No.

Q. Do you know, Mr. Posegate, the volume of stuffed turkeys produced by Armour & Company annually?

A. It has been between 4 million and 5 million pounds annually.

Q. Ever since 1955?

A. Right.

Q. Is your plant at Barron, Wisconsin, also under United States Department of Agriculture inspection?

A. Yes, it is, both inspection and grading.

Mr. Condon: I have no further questions.

Cross examination

By Mr. Kahaner:

Q. Mr. Rosegate, did you say you heard Mr. Atkin testify as to the manner which Swift stuffs their turkeys? Would you say your company is similar or different?

A. The process is different.

Q. As I gather from what you testified, the machine that does this stuffing is controlled; is that what happens?

A. Start and stop control.

Q. And Swift hasn't got that, is that it?

[fol. 93] A. I don't know.

Q. Well, he didn't testify to that at all, did he? Did you hear him testify to that type of a machine?

A. No, I didn't.

Q. Well, why do you use that? Is that better than leaving it for a girl to determine how much stuffing should go into a bird, as Swift does? Would you rather have done it mechanically?

A. You misunderstood me, sir.

Judge Wyatt: Yes. I didn't understand him to say it was done mechanically. There is a clutch, a foot clutch that the girl operates to determine when it starts and when it stops; isn't that right?

The Witness: That's right.

Judge Wyatt: It is the same system as the Swift's.

Q. The girl steps on this clutch?

A. That's right.

Q. And this stuffing is injected into the cavity of the bird?

A. Right.

Q. When she takes her foot off the clutch, it stops?

[fol. 94] A. Yes.

Q. No more stuffing goes in?

A. Right.

Q. Then, in other words, it is up to the girl to determine just how much stuffing goes into the bird?

A. Yes.

Q. The longer she keeps her foot on this pedal, the more stuffing goes into the bird?

A. No.

Q. What—

A. More stuffing may come out of the pump, but it won't go in the bird.

Q. So there is an automatic cut-off?

A. Not automatic.

Q. What then?

A. No, it is not automatic.

Q. If she continues to keep her foot on this pedal, you say that once there is a certain amount of stuffing in the bird, no more stuffing will go in, even though the release is on?

A. That's right.

Q. What stops it from going in?

A. The turkey would go out of her hands.

[fol. 95] Q. The turkey—what is that?

A. In other words, she is holding the turkey.

Q. Yes.

A. And as it fills, she feels it. If it fills she has to move it away. When she sees it's moved away from the end of the nozzle, she stops, and the excess dressing is removed later, if there is any excess.

Q. Well, do you also have a system as to the weights of the bird within a pound or so as they come off the assembly line? You also pick out these birds according to weight, five pounds, six pounds, seven pounds. Are they also done at the same time?

A. Yes, various sizes, depending on range, depending on orders.

Q. Do you have a 5-pound turkey and 10-pound turkey going down the line?

A. Not that extreme.

Q. And as this turkey goes in, is it compressed? As the stuffing goes in, it's compressed into the bird, right?

A. Somewhat, yes.

Q. Do you know how many pounds of stuffing go into a 5-pound turkey?

[fol. 96] A. Approximately a pound and a half.

Q. Well, is your system different than Swift & Company? They have something about a pound and an eighth or a quarter.

A. Yes, I think it is.

Q. So you put more stuffing in your turkey than Swift does?

A. Possibly by weight, I am not sure.

Q. Well, you heard the testimony?

A. Yes.

Q. And from that testimony would you say that Armour puts more stuffing in than Swift does?

A. By the testimony, yes.

Q. Do you also find more than a pound and a half going into a 5-pound turkey?

A. The pound and a half is average. I couldn't answer you.

Q. Well, could there be a 5-pound turkey that would have a capacity to take more than a pound and a half? Would every 5-pound turkey have the same capacity?

A. No.

Q. So actually, even though you have two 5-pound turkeys, you can have a turkey taking a pound and a half, [fol. 97] some might take two pounds?

A. Right—no, not two pounds.

Q. A pound and three-quarters?

A. No.

Q. What then?

A. I wouldn't answer it because I don't know.

Q. Well, would you say the capacity of every 5-pound bird is similar as to taking stuffing?

A. Relatively so.

Q. But there are differences?

A. Slight differences, yes.

Q. Well, how many—

Judge Croake: The variance would be slight?

The Witness: Yes.

Q. How much would you say it varies? What do you call slight?

A. I would say about 10 ounces variance, over and under.

Q. Have you ever tested that?

A. Yes.

Q. When?

A. Several times during our operational—

Q. And you found that the same turkey would take varying weights of stuffing?

[fol. 98] A. Yes, a little difference.

Q. Only a little?

Mr. Condon: Same size turkey.

Mr. Kahaner: Same turkey.

Q. When I say "same turkey," meaning the same poundage.

A. Yes.

Q. And the most variance that it has ever taken is 10 ounces?

A. The most I have seen.

Q. Well, would you say that others have seen where it takes more than 10 ounces?

A. I can't say what others have seen, I don't know.

Q. Well, is it possible to take more than 10 ounces?

A. I don't think so.

Q. You don't think so, or you don't know?

A. I don't know.

Q. Is there a possibility that a 5-pound turkey would have a cavity to take a pound and three-quarters or two pounds of stuffing?

A. No.

Q. Impossible?

[fol. 99] A. No, depends on the stuffing, of course.

Judge Friendly: Your stuffing?

The Witness: Or our stuffing. I wouldn't know.

Q. And you have your plant inspected by the Department of Agriculture?

A. Right.

Q. Poultry Division. And these inspectors—what are they anxious to have happen at your plant? Are they interested in the weight, or are they interested in the wholesomeness of the bird?

A. They are interested in both.

Q. They are?

A. Yes, sir.

Q. Are they interested in making sure that the bird is wholesome, free from disease?

A. Yes.

Q. That's from the beginning, from the time the bird comes in live, is that it?

A. Yes.

Q. And your plant facilities must be sanitary?

A. Yes.

Q. Is that right?

A. Yes.

[fol. 100] Q. And everything in connection with your plant is for the wholesomeness of the bird and to see that it is free from disease; is that the main object of the inspection?

A. That's one of their—

Q. Would you say it's only a minor objective?

A. —prerogatives. It's one of the important parts, double inspection.

Q. Is it a very important part?

A. Yes, double inspection.

Q. It's important that the plant is sanitary and the birds shipped out of your plant are wholesome?

A. Right.
Q. Free from disease?
A. And in good condition.
Q. Good condition.

Judge Wyatt: Do the inspectors at your plants make checks of the net weights that you show?
The Witness: Yes, they do. It's part of labeling.

Q. When they inspect the weight, do they inspect the scale, check it?
A. Not necessarily.
Q. Their job is not to check those scales, they just look [fol. 101] at it, is that it, see that the weight is there?

Mr. Condon: If you know.

A. In some cases they check scales, if they have their own scales.
Q. They bring their own scales into the plant?
A. For some types of weight testing, yes.
Q. What type—I am only talking about the weight testing of the stuffed turkeys.
A. No, no.
Q. They do not bring in their own scales?
A. They do not.

Judge Friendly: How do they check the weights?
The Witness: On the scales that we use.
Judge Friendly: To make sure—
The Witness: We check our own scales. We have scale testers who come in in some states.
Judge Friendly: So far as your department is concerned, they are only checking that the weights are correct as shown by the scales?
The Witness: Yes, that we use the proper tare.

Q. Do you have anybody inspecting to see that there [fol. 102] isn't too much stuffing in the turkey that Swift testified to?
A. Yes, I have four men that work with me as quality control agents.
Q. Quality control as to what?

A. As to workmanship, production costs, methods and procedures which we establish—have established.

Q. What do they do about checking the weight of the stuffing?

A. We determine that on an average basis.

Q. Who is "we"?

A. We know that overstuffed birds are going to come apart in the cooking process. Therefore, we have an established figure and we know how to attain that figure, just like—by the skill that we have taught our people.

Q. When you say an overstuffed bird, what does Armour consider overstuffed on a 5-pound bird?

A. When the crop cavity is overfilled and when the abdominal cavity is filled and when the dressing exudes or sticks out of the abdominal cavity.

Q. And if it doesn't do that, they don't check it, is that it?

A. That's checked by making the dressing in the ab- [fol. 103] dominal cavity conform to the natural contour of the bird, minus a spoonful, to be exact, tablespoonful, to allow a place for the giblets to be inserted.

The other determination of crop cavity is natural contour of the bird, as you see on the table.

Q. Armour & Company, it would appear from what you said, if I understood you correctly, you stuff your bird twice, is that it, or in two operations from the back and from the neck, or somewhere?

A. Right, we do.

Q. What's that, to take advantage of the entire cavity, make sure that it is filled?

A. All poultry is stuffed in that manner. The abdominal cavity and the crop cavity, you cannot stuff them under—

Q. Swift didn't testify to that operation.

Judge Croake: Yes, he said in the process they turn the bird around.

Mr. Kahaner: I'm sorry, I didn't hear that.

Judge Croake: Go ahead.

Q. Actually, there are two stuffings: you stuff it in from the back and then into the neck aperture, is that it?

[fol. 104] A. That's right.

Judge Wyatt: That's for appearance, isn't it, Mr. Posegate?

The Witness: Yes, and you have enough stuffing to satisfy somebody wanting a stuffed bird.

Judge Croake: This probably has been done even before—

The Witness: That's regular cook book procedure.

Judge Croake: All right.

Q. Does it happen that some of these birds are overstuffed as they come down the line?

A. Not at the final weighing station, no.

Q. Where is it caught?

A. It's caught by the people that work along the line, the people that put the giblets on, which is the final process prior to going into the bag.

Q. In other words, they can tell from the appearance of the bird?

A. You can see it.

Q. In other words, if it doesn't look overstuffed, they don't check it?

A. That's right, you can see. That bird's abdominal [fol. 105] cavity is a rigid thing, it doesn't stretch. In other words, it doesn't expand if you try to put pressure on it. If it did, it would blow all to pieces.

Q. But there is a way of stuffing it lightly or stuffing it solidly?

A. That depends on the composition of the dressing somewhat.

Q. Doesn't it depend on the amount of stuffing that goes in, whether you want it to be solidly stuffed or lightly stuffed, you can have the dressing anyway if you want it lightly stuffed, it doesn't matter what the quality of the dressing is?

A. The volume would be—depending on the specific gravity of the dressing—would be the variation. In other words, if you had more dressing your weight would be greater, and vice versa, but your volume would be comparable.

Q. But, actually, you can fill it up and stuff this solidly, this bird, right, and the same bird can be stuffed lightly?

A. Possible, yes.

Q. There would be a difference in the weight of the stuffing, wouldn't there?

A. Oh, yes. Yes.

[fol. 106] Q. Do you stuff all these birds solidly and some lightly?

A. No, we stuff them all alike.

Q. Well, how do you know that a bird is stuffed lightly or solidly?

A. Well, when you get into the term lightly and solidly, you are getting into a difference in types of dressing.

Q. Well, that's the reason we have this statute, but you go and tell me what your reasons are.

A. We cannot stuff, as you use the word, solidly. Anybody would not have customers if they stuffed turkeys to that point because you would have a mass that would be very undesirable.

Q. Are you referring now to Armour & Company and Swift & Company?

A. I am talking about Swift & Company.

Q. Were you going to speak for a lot of other packers who might want to stuff it, put as much stuffing in as the bird would take without worrying about the other matters you are discussing? You say it is a matter of policy, it's up to the packer to determine whether he wants to stuff it lightly or solidly, is that it?

[fol. 107] A. We have a customer to please first.

Q. Well, how do you know whether the customer wants light or solid stuffing?

A. That gets you into the merchandising field where I am—

Q. Oh, it gets beyond you then, right?

A. Right.

Q. But there is a way—in other words, you can—it is up to the packer to pack this the way he wants to, solidly or lightly?

A. To a degree.

Q. And he can determine the weight?

A. No. What do you mean by determining the weight?

Q. The weight of the stuffing.

A. He can determine the volume of a particular type of—

Q. With less volume it weights less, doesn't it?

A. It depends on the type of stuffing.

Q. Look, we are not going to deal in semantics here. If there is less volume, would you have less weight in the stuffing rather than—

A. At a particular time, yes.

Q. So actually the packer determines how much stuffing [fol. 108] he wants to put into that bird?

A. I guess you're right.

Q. And the bird—after the weight is put on, do you actually have one weighing of those turkeys?

A. That's right.

Q. And how long are these birds exposed to the bacteria with the one weighing in your plant? Swift said it takes about a half an hour.

A. Are you talking about the total process now?

Q. Yes, talking about the process, if you take it out of the brine after it has been there soaking for a day and night, and you bring it up and let it go along the overhead conveyors and let it drip, how much time elapses between the time it comes out of the brine, up on to those conveyors, through the dripping process and down in to be stuffed and then finally into the freezing process?

A. 45 minutes.

Q. All of that time the bird is in the process of being stuffed, 45 minutes?

A. Right, a phase of draining or processing.

Q. I am talking about the whole process from the time it leaves the brine.

A. That's right, that's what I am talking about, 45 [fol. 109] minutes.

Q. So in your case the birds take 15 minutes longer than Swift to be processed?

A. Right.

Q. Why do you take longer? Is there any special process you give it?

A. We do not use the liquid freeze. We go into an air blast freeze 30 to 40 degrees below zero and that means it—

Q. During this 45-minute waiting period, is there any deterioration in the bird?

A. It couldn't be measured.

Q. You don't notice any?

A. No.

Q. Did you ever try to determine the condition of the bird at the time it came out of the brine where it has been all day and then measure the bacteria on it from the time it gets frozen, or the condition of the bird?

A. The condition, yes, there is no difference in the condition.

Q. There is no difference?

A. No.

Q. In other words, the bird stays the same from the time [fol. 110] —the entire 45 minutes there is no deterioration at all?

A. Not measurable.

Q. I see—

Judge Friendly: Does your 45 minutes include the freezing?

The Witness: To the freezer.

Mr. Kahaner: That's what I thought, to the freezer.

Judge Friendly: To the freezer.

Q. How long does it take you to weigh your bird?

A. Well, there are two scales—

Q. Well, Swift—

Judge Wyatt: He hasn't finished his answer.

A. (Continuing) We have two scales and they are weighing at the rate of a little over 300 an hour.

Q. Your scales are faster than Swift's?

A. There is a difference in these scales, a difference of operation.

Q. So that—

Judge Wyatt: Wait just a minute. When you say that your time of processing is somewhat longer than what Mr. Atkin described, I take it that your birds may wait at [fol. 111] the end of the process until a batch is accumulated because you put them into the freezing chamber in batches?

The Witness: Right, that's correct.
Judge Wyatt: And they wait for a period to accumulate a batch?
The Witness: That's right.
Judge Wyatt: Go ahead.

Q. So that you weigh 300 birds an hour. Actually if you had to make another weighing, would that affect the birds? Does the extra third of a minute—
A. No.
Q. There wouldn't be any difference in the deterioration, it would still be wholesome, fit for human use?
A. Right.
Q. How long have you—has Armour been selling these buttered—stuffed turkeys?

Mr. Kahaner: I used—

A. Nine years.

Mr. Kahaner: It shows you what advertising can do.

Q. During that period, did your firm ever ask you to set up a double weighing process?
[fol. 112] A. No.
Q. No atempt was made to actually weigh the birds before they were stuffed?
A. No.
Q. You were never even asked to prepare any plan or anything in the weighing, or set up another scale for test purposes, or any other purpose?
A. No.

Mr. Kahaner: That's all.
Judge Friendly: Is there anything further?
Mr. Condon: I have no further questions, sir.
Judge Friendly: You may be excused.

(Witness excused.)

Judge Friendly: I think we will adjourn then until—
Judge Wyatt: Mr. Condon, I take it that one of your points is that you are required to secure the approval of the Department of Agriculture for a label which would have simply the net weight of the turkey on it?

Mr. Condon: Yes, sir.

Judge Wyatt: And that you tried and you couldn't get that approval?

[fol. 113] Mr. Condon: Well, we tried a variation of that, yes, sir.

Judge Wyatt: All right. Now, just point out to me where you are required to get any approval of the Department of Agriculture for a label that just had the net weight of the turkey on it.

Mr. Condon: In the regulations—

Judge Wyatt: Yes?

Mr. Condon: —Section 80.127 requires the entire approval by the Department of Agriculture of all labels.

Judge Wyatt: I don't read it that way. It requires the approval of all labels bearing official identification.

Mr. Condon: Oh, well, yes, that's true, your Honor, but you see—

Judge Wyatt: If you put another piece of paper, another part of the CRYOVAC wrapper and used it for the net weight of the turkey, you wouldn't have to get any approval from the Department of Agriculture, would you?

Mr. Condon: According to the law and regulations, your Honor, labels and labeling are described to include anything that is on, around, in or accompanying the product. [fol. 114] This would be part of the label.

Judge Wyatt: I don't read the regulations that way, but at any rate you have cited 80.127. That is the source of your argument?

Mr. Condon: That is the source of my argument, that it requires prior approval, yes, sir.

Judge Wyatt: All right.

Judge Friendly: All right, gentlemen, we will adjourn to Tuesday at 10:30 in the same room.

(Adjourned to March 10, 1964, at 10:30 a.m.)

[fol. 115] New York, March 10, 1964,
10:30 A. M.

(Hearing resumed.)

The Clerk: Swift & Co. and Armour & Co., plaintiffs, versus Don J. Wichham, Commissioner of Agriculture and Markets for the State of New York, defendant.

Are plaintiffs ready?

Mr. Condon: Ready.

The Clerk: Defendant?

Mr. Kahaner: Ready.

The Clerk: Both sides are ready, your Honors.

Judge Friendly: All right, Mr. Condon, do you have another witness?

Mr. Condon: Thank you, sir. Mr. Hauver.

William E. Hauver, called as a witness by the plaintiffs, having been first duly sworn, testified as follows:

[fol. 116] Direct examination

By Mr. Condon:

Q. Mr. Hauver, what is your occupation, please?

A. I am a deputy director of the poultry division of the Agricultural Marketing Service, United States Department of Agriculture.

Q. What is your responsibility in that position?

A. Within that position I have responsibility for the coordination of the inspection and grading programs conducted by the Department on poultry.

Q. How long have you been in the Department of Agriculture?

A. Since 1938. That would be twenty-six years.

Q. For the record would you give us your education, please?

A. Well, I attended the University of Maryland, graduated there in 1933, and I also got a master's degree in 1935, and that's the extent of it.

Q. Have you been with the Poultry Division, the Department of Agriculture ever since 1938.

A. I have been with the Poultry Division or its predecessor agencies. We had some changes of names during the years but it is essentially the same line of work.

Q. Does this division have responsibility for enforce-[fol. 117] ment of the Poultry Products Inspection Act?

A. Yes, sir.

Q. And what is your responsibility with respect to that act, you, as an individual?

A. Well, as deputy director of the division, my assignment deals with, as I say, the coordination and supervision of the poultry inspection service, that is, provided pursuant to that act.

Q. Were you in your present position when this act was passed in 1957?

A. No, sir. I was in the Poultry Division but not in this position.

Q. What was your position at that time?

A. I was assistant chief of the Standardization and Marketing Practices branch of the Poultry Division.

Q. Will you tell us, sir, what is the scope and purpose of the Poultry Products Inspection Act?

A. Well, basically the Poultry Products Inspection Act was designed as a consumer protective measure. It is concerned with the wholesomeness of poultry.

Judge Friendly: Doesn't the act speak for itself? Do we need to waste any time on that?

Mr. Condon: We can get right along.

Q. Tell me, Mr. Hauver, if someone in the industry who [fol. 118] is subject to the act wants to put a label on a poultry product what is the procedure that is required by the Department of Agriculture for the use of that label?

Mr. Kahaner: I object, your Honors. I don't see how material that is.

Judge Friendly: We would like to hear it, but the question of its legal effect is something else again that we will have to consider.

You may proceed.

A. Well, the person who wants to get a label in use on a poultry product under inspection submits a proposed label, either an artist's sketch or a photostatic printer's proof to our Poultry Inspection branch, and it is reviewed by our Food Products section and commented on, either favorably or there might be some suggestions for some changes in the label prior to its approval.

Q. Suppose you comment on that label unfavorably, what happens then?

A. Well, we explain in our letter to the applicant the reasons why the label does not conform to the policies of the poultry inspection program and we might suggest changes or just explain the objections to any particular [fol. 119] part or statement on the label.

Q. Do you require that this label get your final approval before it may be used?

A. Yes, we do.

Judge Wyatt: Well, now, in administering the act, Mr. Hauver, does your department take the position that anything that goes on the package has to get your approval?

The Witness: Yes, sir, we do.

Judge Wyatt: Well, as I read the regulations, it only refers to a label which contains an official designation.

The Witness: Well, we regard the label as all printed matter that is with the product or on the container or accompanies the container.

Judge Wyatt: Whether it has the official designation—and by that I understand the number of the plant and your—

The Witness: Inspection mark.

Judge Wyatt: Inspection mark or not?

The Witness: Yes, sir. We consider the entire printed matter as part of the label, and we review it all in conformance with the policies that we have for label proofing.

[fol. 120] Judge Wyatt: Suppose that some printed matter is on the container but is not physically part of the label containing the official designation; in administering the act do you take the position that your department has to approve that?

The Witness: Yes, we do. We consider all printed matter, graphic matter that is with the package as it leaves the plant as a part of the labeling material, and we do approve it.

Judge Wyatt: So if it is a round sticker having the words "Net weight of turkey, 6 pounds," physically separated from everything else but affixed to the package, you would, in administering the act, require that that be approved by your department?

The Witness: That's correct.

By Mr. Condon:

Q. And if the processors subject to the act affix a label to the product which did not bear your prior approval, what would be the effect of that as far as the administration of the act is concerned?

A. Well, we would not let the product out of the plant because in order for a product to be eligible to move out of the officials establishment it must bear an approved label.

[fol. 121] Q. What comprises—

Mr. Condon: Well, never mind. May I have this marked for identification, please?

(Plaintiffs' Exhibit 5 marked for identification.)

Q. Mr. Hauver, I show you Plaintiffs' Exhibit 5 for identification and ask if you will identify it for us, please.

A. This is an application for approval of a label for stuffed turkey.

Q. Application submitted by whom?

A. By Swift & Co.

Q. And does it have any official action of the Department of Agriculture in connection with it?

A. In this it was granted temporary approval on November 1, 1962, and the reason for the temporary approval is that the ingredient statement was not placed in the proper position that we normally require on labels.

Mr. Condon: I offer it in evidence.

Mr. Kahaner: May I see it?

Judge Friendly: Let counsel see it.

Mr. Kahaner: I do not really know what this is being offered for. Is that the label now in existence to show—[fol. 122] or is this some label that was submitted—is this the label that now is being used by Swift?

Mr. Condon: Essentially so; essentially so. Maybe I could ask the witness a couple more questions.

Mr. Kahaner: I want to know the purpose of this particular label.

Q. Does your file disclose, sir, whether this is the label that is currently approved for use by Swift & Co.?

A. Well, that one is—that label was granted approval November 2, 1962, I believe.

Q. No, this terminates November 1, 1962.

A. Well, then since that time we approved another label, essentially the same, which had a few minor comments concerning the arrangement of the wording. That label was also granted temporary approval effective November 2, 1962, and it was to be terminated December 31, 1962.

Mr. Kahaner: Well, I renew my objection. I still do not know what the purpose of submitting temporary approval is. Isn't there some label that has been approved, that is in use at this time?

Judge Friendly: We will receive it. We will get the [fol. 123] whole history later, if that is important.

(Plaintiffs' Exhibit 5 received in evidence.)

Judge Friendly: You may proceed, Mr. Condon.

Mr. Condon: I would like to work from that.

Judge Friendly: You may proceed. We have learned how to read and listen at the same time.

Q. Mr. Hauver, will you tell us with respect to Plaintiffs' Exhibit 5 in evidence, is this a typical application for approval of a poultry product?

A. Yes, it is.

Q. And what comprises the parts of such an application? Now, I know that they are here and they can be looked at, but will you tell us just briefly what do you want to know when a label is submitted to you for a product?

A. In any label, when we look at it for approval, we look to see that it contains the necessary information as stipulated in the law.

We also look to see whether it contains any information that might be false or misleading.

If it is a label for a product that is composed of several ingredients we look at the ingredients statement to see that that is proper. We look at the formulation and the [fol. 124] method of processing, preparation of the product, to see that it is appropriate, and in accord with policies that have been followed, and if all that is in order we approve the label.

Q. Why do you require the formulation?

A. Because, in the first place, we want to examine the ingredient statement to see if there are any substances in there that are, might be deleterious and not appropriate for use in a particular product.

Another thing, we want to see that, for instance, on some products we have minimum standards insofar as the meat content is concerned, and we want to see that the product does comply with that standard.

So basically that is the reason we examine the formula and the method of preparation.

Judge Wyatt: It is quality control?

The Witness: That's right, and wholesomeness and prevention of adulteration and the like.

Mr. Condon: May I have this marked for identification, please?

(Plaintiffs' Exhibit 6 marked for identification.)

Q. Mr. Hauver, I show you Plaintiffs' Exhibit 6 for identification, and ask you if you will identify it, please.

[fol. 125] A. Well, this is a label that was submitted by Swift & Co. for stuffed turkey, and this was commented on only. This particular label had the weight of the turkey and the weight of the dressing and the total weight of the product shown on it, and we did not approve it.

Our comments on this particular label were to the effect that "The net weight shown in the manner proposed would be confusing to the consumer. Furthermore, this type of net weight declaration would require two weighings. The initial weight of the turkey would have to be kept on each turkey until it was stuffed, packaged and reweighed. The confusion which might result from such a procedure could result in improper weights being shown on the product."

So we did not approve this particular label.

Q. When was that submitted, Mr. Hauver?

A. It was submitted May 28th—it was submitted May 20, 1963, and we commented on it on the 28th of May, 1963.

Mr. Condon: I offer it in evidence.

Mr. Kahaner: No objection.

Judge Friendly: Received.

[fol. 126] (Plaintiffs' Exhibit 6 received in evidence.)

Mr. Condon: May I ask that this letter be marked for identification, please.

(Plaintiffs' Exhibit 7 marked for identification.)

Q. Mr. Hauver, were you familiar with the application in Plaintiffs' Exhibit 6 in evidence when it was submitted? Did it come to your attention?

A. Yes, it did.

Q. Do labels normally come to your attention when submitted for approval?

A. Not routinely unless there is some question or change in a label that is out of the ordinary, that involves some change from routine policy.

Q. And why did Plaintiffs' Exhibit 6 come to your attention?

A. Simply because it showed this breakdown of the weighing and our procedure has been to show the net weight of the product, total product, and in this case the product is stuffed turkey and all the ingredients are considered part of it.

Q. Is it your testimony that this was an unusual request?

A. It is, yes; it was an unusual request.

[fol. 127] Q. And that is why it came to your attention?

A. Well, we discussed it, yes, sir.

Q. I show you Plaintiffs' Exhibit 7 for identification and ask you to identify that for us, please.

A. Well, this is a letter from our Dr. Lee, head of the Poultry Products section, who handles label approvals and that type of work, to Mr. Spiker of Swift & Co.'s Washington office, in which we returned the proposed labels for this previous exhibit, explaining our reasons for not approving the labels.

Q. Are they different reasons than those given on the—

A. Essentially they are the same. We point up the fact of what our requirements are under the act and the reasons for not allowing dual weights because of the impracticability of checking on it accurately.

Mr. Kahaner: If your Honors please, I think I should object. That is not the best evidence, to talk about a letter.

Judge Friendly: Sustained. The letter will speak for itself.

Mr. Condon: I offer it in evidence.

Mr. Kahaner: I object to it, your Honor, not the best [fol. 128] evidence.

Judge Friendly: You object to the letter as not the best evidence?

Mr. Kahaner: Well, the person who wrote the letter should be here, your Honor.

Judge Friendly: Overruled.

(Plaintiffs' Exhibit 7 received in evidence.)

By Judge Wyatt:

Q. Mr. Hauver, on this Exhibit 6, is the portion of the label which shows the net weight of the turkey separate, this scotch tape addition in the form of a typed piece of paper?

A. Well, it was merely for the purpose of submitting the label. Had we approved it this would have been printed right on the label, just like all the rest.

Q. I understand. But that is the part of the label that you found objectionable?

A. That's correct.

Q. And what is the significance of this ink crossing out of a word "stuffing" and the addition of a word "turkey"? Do you understand that? On this Exhibit 6. Do you see the place to which I refer here and here (indicating)? Was [fol. 129] that part of the label as submitted for approval?

A. Apparently that was part of the label submitted for approval.

Q. They changed "stuffing ingredients" just to "ingredients" and they added "turkey" to the list of ingredients.

A. That is the point. We commented on that earlier because turkey was not listed and that is the most predominant part of this product.

Mr. Condon: May I ask that this be marked for identification, please?

(Plaintiffs' Exhibit 8 marked for identification.)

By Mr. Condon:

Q. I show you Plaintiffs' Exhibit 8 for identification, Mr. Hauver, and ask if you would identify it for us, please.

A. Well, this is an application by Armour & Co. submitted August 16, 1963, for a product called stuffed turkey, stuffed young hen turkey. It was commented on only on August 19, 1963, and our comments were to the effect that the total net weight of the poultry product, including the stuffing, must be shown in lieu of separate net weights. [fol. 130] They had proposed in this sketch to show the weight of the turkeys and the weight of the stuffing.

Judge Wyatt: That is an Armour application?

The Witness: Armour application.

Q. That is essentially the same application as the one submitted for Swift & Co., which was Exhibit 6?

A. Yes, sir.

Mr. Condon: I offer it in evidence.

Mr. Kahaner: No objection.

Judge Friendly: Received.

(Plaintiffs' Exhibit 8 received in evidence.)

By Mr. Condon:

Q. Is it the policy, Mr. Hauver, of your department to permit only a single net weight on any combination poultry product?

A. That is the policy, yes, sir.

Q. Has this always been your policy?

Mr. Kahaner: I object to it, your Honor.

Judge Friendly: On what ground?

Mr. Kahaner: On the ground that there is no foundation laid as to how this witness knows what the policy has been for any length of time.

Judge Friendly: Oh, he certainly stated some qualifica- [fol. 131] tions. Overruled.

You may answer.

The Witness: Would you repeat the last part of that question?

(Question read.)

A. Generally speaking it has; however, there has been one instance where we did authorize the label.

Judge Wyatt: The Cornish game hens?

The Witness: Yes, sir. And that was given a temporary approval.

Q. What product was that?

A. It was boneless stuffed Cornish game hen, Rock Cornish game hen.

Q. For whom or by whom was the application submitted for that?

A. By Idle Wild Farms in Pompfret Center, Connecticut.

Q. You gave a temporary approval for separate weight statement on that product?

A. Yes, we did.

Q. What considerations led you to make that exception, if it was an exception, in your policy?

A. Well, we had not had any experience in handling a product, an operation whereby the weights were broken out [fol. 132] separately, and we wanted to get some experience in this area to see if it was workable. One reason why we did this on this particular product was because of the fact that it is a small operation, it is a hand operation. The dressing is very carefully measured out, a two-once portion, and it is placed by hand in each bird, so we felt there was reason to believe that it could be accurately stated by virtue of the process that this firm employed.

Q. What kind of stuffing was that?

A. Well, it was rather exotic, you might say, stuffing, wild rice and wines and some bread and so forth, but it is not the usual stuffing that you would find, that I would prepare for the birds that we use at home. Wild rice is rather expensive.

Q. Is that approval still outstanding?

A. No, it is not.

Q. When was it terminated?

A. July 1, 1963.

Q. And this label was not used after July 1, 1963?

A. Unfortunately this label was used subsequent to that date, and I learned about it just as late as last week that this firm had been continuing to use the label which showed [fol. 133] the weight of the stuffing and the weight of the bird. It seems that on July 1st we disapproved the label. There was some conversation with the firm. We did grant a continued temporary approval with the condition that the label be obliterated in such manner to eliminate the weight of the stuffing and show only the total weight of the product.

There were discussions between the firm and our people in Washington, but they told them that they would not approve it unless that was done. It seems that the plant management discussed this matter with our inspector in the plant and advised him that he had gotten verbal approval from Washington, to continue the use of the label, but that did not occur, and the manager admitted to our officer in charge of the labeling section just last week that he had not been given approval by anyone in Washington, so that actually what was happening, the label was obliterated as indicated in the corner by deleting, but the firm then obtained a supersensitive tape label and applied it to another part of the product, of the box, on poultry which was coming to New York.

[fol. 134] Q. Is that label now in use?

A. It is not.

Q. Assuming, Mr. Hauver, that Swift & Co. packs its stuffed turkey in a package with a label as you have approved it. showing the net weight of the product, including the dressing, and ships it to a retailer in New York State, suppose that retailer were to add to the label the weight of the turkey; would your department have objection to that?

A. Yes, we would.

Q. Why?

A. Well, there is no way in the world for that retailer to know the weight of that turkey. They would just be estimating the weight of the turkey.

Mr. Kahaner: If your Honor please, I object to any testimony as to this assumption of what would happen and how this witness knows in what way the retailer would not know what was the weight of the bird. I mean, it is assuming a lot of facts. There has been no foundation for this type of testimony.

Judge Friendly: Let me see, the case you are putting to the witness is what, that if Swift & Co. informed the retailer separately of the weight of the bird?

[fol. 135] Mr. Condon: Yes, sir. Actually, in fairness, your Honor, I did not say that—

Judge Friendly: Well, we will let the witness testify as to what he thinks the attitude of the department would be. It is getting pretty hypothetical, but I do not think it will do any harm in letting him say what he thinks the attitude would be.

The Witness: Well, we would object to it.

Q. Is it then the position of the department that its control of the label on this stuffed turkey product carries through to the consumer?

A. Yes.

Mr. Kahaner: I object to that, your Honor. There is no evidence to show that there has been any attempt made by anybody to put that type of a label on the bird by the retailer.

JudgeFriendly: What was that question?

(Question read.)

Judge Friendly: Well, we will grant the motion to strike the answer.

Judge Croake: May I ask a question, Mr. Condon?

Mr. Condon: Yes.

[fol. 136] By Judge Croake:

Q. As I understand it, the application of Armour & Co., which is, I think Exhibit 8 in evidence, indicates the net weight of the turkey, the net weight of the dressing and the total net weight of the product, is that right?

A. Yes, sir.

Q. Would your department approve a label that just showed the net weight of the turkey and the combined net weight of the package?

A. No, sir, we wouldn't. Our requirements are for the combined net weight of the product.

Q. Has such an application been made to you, do you know?

A. You mean for the breakdowns?

Q. No, the net weight of the turkey and the combined net weight of the package?

A. I don't believe so.

Judge Croake: That is all.

By Judge Wyatt:

Q. Mr. Hauver, in the case of the last exhibit, which was Armour, the exhibit carries the statement on it, "Commented on only," or "Comment only."

A. That's right.

[fol. 137] Q. Does that mean that you neither approved or disapproved it?

A. Well, in effect, that constitutes a disapproval, when you read the comments that we make, when we said we would not approve it as presented.

Q. Well, according to your procedure, is that your method of disapproving the label?

A. That is one of our methods, yes, sir. We also followed with that letter in the other case, explaining it a little further.

By Judge Croake:

Q. Is there any appeal from that procedure of yours within the department?

A. Yes, sir, there is appeal proceedings.

Q. Was such an appeal taken here?

A. It was not.

Mr. Condon: I have no further questions.

Judge Friendly: Cross-examine, Mr. Kahaner.

Cross examination.

By Mr. Kahaner:

Q. Mr. Hauver, are you here by subpoena?

A. Yes, sir.

Q. And were you subpoenaed about two years ago? You were a witness for Swift & Co. in a criminal action against them in the City of New York.

[fol. 138] A. Yes.

Q. And at that time the attempt was being made to convict them for failure to comply with the State Agricultural and Markets Law, is that right?

A. I believe that is correct, sir.

Q. With reference to net weight?

A. That's correct.

Q. And you were called in as a witness to testify about the procedure of your department?

A. That is correct.

Q. You were not permitted to testify too much in that proceeding, were you?

A. No, sir.

Q. And Swift & Co. was convicted in that proceeding, weren't they?

A. I believe they were.

Q. Do you know whether an appeal was taken from that conviction?

A. I do not know.

Q. Mr. Hauver, you are familiar with the purposes of the act, of the Poultry Inspection Act, aren't you?

A. Yes, sir.

Q. And do you know what the declared policy or purpose of the act is?

[fol. 139] A. Yes, sir.

Q. That section—there is a specific section of the Poultry Act, Section 452, is that right, of the Poultry Act, which is the conventional declaration of policy?

A. I assume—I don't know the sections of that book, sir. I have a copy of the law here that I usually carry with me for reference, but I assume it is correct, sir, your citation.

Q. Would you say that the purpose of the Act is to make sure that all poultry that is moved in interstate or foreign commerce is wholesome, unadulterated and fit for human food; would you say that is the specific purpose of that Act?

A. That is one of the purposes, yes, sir.

Q. What do you mean one of the purposes? It says here this is the purpose of the Act. Isn't this the sole purpose of the Act?

A. Well, this Act is broken down into—

Q. I am asking you a question. Do you want to read something in that Congress did not mean what it said?

Judge Friendly: Well, you are just arguing, Mr. Kahaner.

[fol. 140] A. I don't want to read it in.

Q. Well, I am just reading—you have the Act there.

A. Yes, sir.

Q. Is there any other purpose than that set forth in the Congressional declaration of policy?

A. I would say yes, otherwise there would not be so much other material covered in the Act. I mean there are several parts here; sanitation is specifically treated with.

Q. Yes.

A. Wholesomeness.

Q. That's right.

A. Labeling.

Q. They are all supposed to make sure that the poultry is wholesome.

A. Adulteration.

Q. Unadulterated.

A. That's right.

Q. And fit for human consumption.

A. That's right.

Q. The Act specifically deals with how the plants are to be sanitary, how the birds are to be killed, how they are to be kept refrigerated, every particular part of the Act deals [fol. 141] with the fact that this poultry is to be wholesome and unadulterated and fit for human consumption, isn't that right?

A. That's right.

Q. So that is the sole purpose of the Act.

A. No, sir, I would not say it is the sole purpose.

Q. Then you want to read something into Section 452 which is not there?

A. I think in answering your question you must consider—

Q. I am asking you—

A. —consider the entire Act.

Q. I am considering the—

Mr. Condon: Let him answer the question. Finish your answer.

Q. Look, Mr. Hauver, I am considering the specific statement by Congress as to its declaration of the purpose of the Act.

Judge Croake: Mr. Kahaner, that is not dispositive of this action, what he thinks. The Act says what it says. We can read it. His interpretation may be one, ours may be another, yours may be another, but there it is.

[fol. 142] Q. Going back to the provisions of the Act, even where it says "Definitions" in the Act, the Act specifically describes who an administrator is, and I particularly ask you where it says "Adulterated"—that is 81(1)—

Mr. Condon: Are you in the Act or the regulation?
Mr. Kahaner: I am sorry, the regulations.

Q. Have you got that?
A. Yes, sir.
Q. Will you look at subdivision 6 as to the meaning of adulterated. It says there "The product is adulterated if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight or restrict its quality or strength or make it appear better or of greater value than it is."
Is that right?
A. That is what it says, yes, sir.
Q. Now, would you say that where stuffing is added to turkey and there is no identification that the bird weight includes the stuffing, would you say that that would make it appear of greater value than it is or increase its bulk or weight?
[fol. 143] A. No, I would not say that this product is adulterated on the basis of that because the name of the product is a stuffed turkey, and the weight of that product is shown on it.
Q. That is your opinion?
A. By act and by regulations, that is what it is.

Q. When these rules and regulations are passed upon for the labels, do you take part in consideration of the labels?

Judge Wyatt: I don't understand that question.

(Question read.)

Judge Wyatt: I don't understand that, Mr. Kahaner.

Mr. Kahaner: I want to know when a person submits a label for approval, do you participate.

Judge Croake: Does he participate?

Mr. Kahaner: Yes.

Q. Do you participate?

A. No, not ordinarily.

Q. What would you say Subdivision 6 means where it says specifically that anything that has been added to increase its bulk or weight would adulterate the poultry?

[fol. 144] A. Water would be one thing in a product such as turkey, and if an excessive amount of moisture were added, that would be adulteration. We are very much concerned with that all the time, preventing adulteration.

Q. But it says specifically "mixed or packed therewith." What would be the substance that would adulterate, according to this section?

A. Well, water could be mixed or packed therewith because it could get in, in between the skin and the tissue and between the muscle and the skin, and quite a bit of weight can be added to poultry that way.

Q. So that is the only way you interpret that?

A. Not the only way.

Q. That something that could be added would have to be just water?

A. Not necessarily. It could be some other substance, but the one that we have been primarily concerned with, of course, is water.

Q. Well, it says "mixed or packed therewith." That means actually, in the ordinary reading of this, it would mean some substance that is packed with the poultry; [fol. 145] wouldn't that ordinarily mean that?

A. No.

Q. You would not read it that way or understand it that way?

A. Well, I would not understand it to mean an added food ingredient that is used in the preparation of a poultry food product as being an adulterant, if the product is properly labeled to advise the consumer as to what to expect in the product.

Q. So, in other words, it could be mixed or packed therewith as long as it does not appear to be of greater value than it is, is that right?

A. Well, I don't—that's correct.

Judge Wyatt: Mr. Condon, supposing somebody was selling frozen turkey and without any indication on the label put stuffing in it?

The Witness: That is adulterated.

Judge Wyatt: It is possible—this is all in argument, but I would suppose it is possible, it could be adulterated.

Mr. Kahaner: Yes, but the section or the paragraph goes on to say that it is mixed or packed therewith so as to make it appear better or of greater value. In other words, there [fol.146] is no objection—I am not saying that stuffing per se makes it adulterated, but by stuffing it to make it appear of better or greater value.

By Mr. Kahaner:

Q. Now, where you do not specify that there is stuffing, the amount of stuffing in that turkey, would you say that that would make it appear of greater value?

A. No.

Q. The turkeys that are sold by Swift and Armour are sold at so much per pound, is that right?

A. That's right.

Q. According to what you are saying, if they sell an eight-pound turkey that has, let us assume, two pounds of stuffing, and they do not say how much stuffing is in it, they just say "stuffed turkey, 8 pounds," and sell it for 50 cents a pound, and that makes the turkey $4, but you are actually paying for two pounds of stuffing at the same rate as you are paying for the meat of the turkey—

A. That's right.

Q. Doesn't it make it appear that the housewife is getting greater value than she actually is?

A. Well, it all depends on how the housewife measures [fol. 147] value in this product. This is a convenience item.

Q. In other words, you do not care how you value it, as long as the housewife is smart enough to realize this problem, then you are satisfied?

A. We are concerned—we try to evaluate as best we can what a reasonable consumer expectancy is. We are constantly faced with that problem in approving labels, and we have determined here that most housewives would know that a product labeled "stuffed turkey," that would have some bread and possibly some onions and some celery or sage or something like that in it, because I believe many housewives have stuffed turkeys and they know just about the amount of stuffing that it takes to fill up the cavity, and I think most of them probably do fill up the cavity. I know I do.

Q. You do your own stuffing?

A. My wife does, and I have stuffed turkeys, yes, sir.

Q. Well, from what you said, the housewife would know ordinarily how much stuffing goes into a turkey, is that right?

A. Quantitatively, but I doubt if she would, as far as the [fol. 148] actual weight. I don't think she calculates weights and so forth, like we are talking about here.

Q. Isn't it important for the protection of the consumer that she knows actually what she is paying for? Isn't your department interested in that?

A. Yes, we are interested and in this case she is paying for a stuffed turkey.

Q. Yes, but suppose we have an unscrupulous packer that stuffs three pounds or four pounds of packing into a turkey, stuffing into a turkey, would the housewife know?

A. We approve these labels for products, and we also review at the same time when this consideration is made the processing procedure, the amounts, the variations, the ranges in the amounts of stuffing, and we also have inspectors stationed in plants to check on these formulated items to satisfy themselves that the product is packed in compliance with the approved formula.

Q. I see. That is one of your inspectors who inspect the poultry for wholesomeness, don't they?

A. It could be, but the number of inspectors that we have in a plant depends upon the complexity of operations, [fol. 149] the types of products that are prepared. In some plants we have additional, an additional inspector who handles the supervision of these combination foods and checks on the formulations.

Q. Let us get back to the—

Judge Croake: Does this inspector weigh the stuffed bird before and after in order to determine the amount of stuffing?

The Witness: Yes, he does.

Judge Croake: He does that?

The Witness: Some weight checks are made on the product. As the product is packed, I think the testimony the other day here indicated it is a rather rapid operation, and he gets down at the end of the line, just before the product goes through this shrink tank and into the freezing solution, picks up the product and takes it in and weighs it, removes all the stuffing and is sure that he gets it all out, and in that short period of time there is no transfer of fluids from the bird to the stuffing, so that he can get an accurate, reasonably accurate weight of the bird and the stuffing and calculate his percentages to determine reasonable compliance with the approved formula.

[fol. 150] Judge Wyatt: That is just a spot check.

The Witness: That is correct.

Judge Wyatt: He doesn't take by any means, certainly, all the birds?

The Witness: No, he does not. He is spot checking that. He has to check on sanitation, a lot of duties around the plant, but if our inspectors are alive and alert—we hope they are—they should know what is going on.

Judge Croake: Any question in your mind about it, whether they are alert?

The Witness: My earlier testimony might indicate that I was concerned about one, but we feel that these men make sufficient checks to know what is going on in that plant.

By Mr. Kahaner:

Q. Mr. Hauver, you said that mainly you depended on the housewife from her experience to know how much stuffing is in the bird when she buys it at retail, is that right?

A. Yes, qualified by the limitations in the approved formulation; that would be the maximum amount.

Judge Croake: Mr. Kahaner, isn't the question does she have a right to know?

[fol. 151] The Witness: Yes, I assume she would have a right to know; certainly if a person is concerned, it seems to me that they would have that right.

Judge Croake: Thank you.

Q. But according to what you say, your department at the moment is not interested in her right to know specifically how much stuffing is in that bird?

A. We are interested, but we are concerned with the difficulties in accurately giving that consumer that information, and we feel that it is better not to provide information that could be improper, incorrect information in a situation such as this.

Q. So you would rather give no information at all?

A. Than wrong information, yes.

Q. Have you tested to see whether in any plant wrong information is possible?

A. Yes.

Q. You have tested a double weigh?

A. Oh, no, not this double weighing process, no, sir.

Q. Then, what makes you so sure of something being wrong with the double weight being shown?

[fol. 152] A. Well, we have reviewed the processing operations that are involved in preparing stuffed turkeys, and there are just too many opportunities for confusion and mixups in carrying the weight of this raw bird through to the end of the line and the calculations that are involved could result in wrong weights being applied to the ingredients.

Q. But you still have not tested it to find out if such a wrong weight is possible?

A. We have not tested it.

Q. Wouldn't you think it would be an ordinary thing to solve this problem if, as you say, both Swift and Armour submitted these labels and you turned them down because of the possibilities of confusion? Did you ask Swift and Armour to make a test of a few birds?

A. No, we did not.

Q. You did not think it was necessary?

A. Well, you see our—

Q. Would you answer the question? Did you think it necessary to ask them to make a test?

A. It did not occur to us, no, sir; we did not think it was necessary.

Q. You just relied on possibilities?

[fol. 153] Judge Friendly: I think you have brought out your point. There is no purpose in further argument.

Q. Mr. Hauver, to show the intent of Congress, have you noticed under the regulation, the definitions; did you notice whether net weight is mentioned at all in definitions of the regulation?

A. Net weight is not defined, no, sir.

Q. So it does not appear to have been important to even give a definition to net weight, is that right?

A. It is important.

Q. Well, wouldn't you think that if it was important that they would give some definition here, define it in the regulation? I am asking you. Practically everything else here is defined. There is a definition what dressed poultry is, what container of package is, what inspected for wholesomeness means, what giblets means, what adulteration means. Everything is specifically defined in the regulation, but nowheres can you find any definition of net weight.

A. Well, apparently—

Q. Look, will you answer this?

A. Well, in preparing this regulation we did not think it [fol. 154] was necessary to define net weight. That is rather obvious in the minds of most people, the net weight of the product. We define product and what it consists of to mean the combination of food with all of the ingredients, and the net weight of that product is required by regulations to be shown on the package. That is true in the Act also.

Q. Well, the regulation specifically says net weight. You have made your own definition, is that it? You have described net weight to mean not only the net weight of the poultry or the turkey, but actually what has been added to it, like stuffing; that is part of net weight; that is your own idea?

A. It is in the Act. It is in the law.

Q. But this is not in the regulation, right?

A. It is in the regulations, and in the law, both.

Q. At the beginning. I am talking about when the definitions were passed, when the definitions were set out at the time the Act was passed by Congress.

A. Net weight is not defined in the law and it is not defined in the definition section of the regulations.

Q. Will you please look under the definitions where it [fol. 155] says "Labels"?

A. Yes, sir.

Q. It says "Label means any written, printed or graphic material upon the shipping container, if any, or upon the immediate container, including but not limited to an individual consumer package of the poultry product or accompanying such product."

Still when it describes the label it does not even say what it is supposed to contain, is that right?

A. Well, that's right, it does not say what it is supposed to contain, but it says that elsewhere in the regulations. You do not put the entire context of your regulation in the definition section.

Q. The only part here, as I see, that discusses it in the regulations—and check me if I am wrong—is 81,129, which says—no, 81,130—it says "wording on labels," and subdivision 3 says—the section starts out saying, "Each label approved for use on an immediate container for poultry products shall bear in distinctly legible form the following information," and it says, subdivision 3—oh, first, it first deals with the usual name of the poultry product; the second is a statement of ingredients, and they specifically [fol. 156] say, they go into what the label must contain as to ingredients.

It is very important to specify every ingredient that is in this product, is that right?

A. That is correct.

Q. And now we get to subdivision 3. It says, meaning the labels, "The net weight or other appropriate measure of the contents," so that the provision is made not only for net weight but some other appropriate measure, is that right?

A. That's correct.

Q. So Congress did not feel that it was important or the Secretary did not feel that it was important that the net weight be put on the labels if another appropriate measure could be approved, is that right?

A. That is correct, and that applies to broths and liquid products.

Q. One minute. Are you reading something into the regulations that is not there?

Judge Friendly: No, he is telling you what "other" refers to.

A. I helped to write this. I was there when this was prepared. I do know that is why that "other appropriate [fol. 157] measure of contents" is for the liquid products that are sometimes prepared.

Q. Then it says, "The administrator may approve the use of labels for certain types of immediate containers which do not bear the net weight, provided that the retailer affixes the label with the net weight," is that right?

A. That's correct.

Q. So that in some cases poultry or turkey could be shipped and be approved with a label that did not even have net weight on the label?

A. On the immediate container.

Q. Yes.

A. Yes, sir.

Q. Well, which would mean—this is the immediate container—

A. The bag.

Q. —that they approved, that they asked you to approve, where net weight was not even necessary, that could have been approved by your department?

A. Under certain conditions as spelled out here further.

Q. That's right. But there is provision for labels to contain everything but net weight or any weight.

[fol. 158] A. There is that provision in this regulation, yes.

Q. Did the plaintiffs here, Swift and Armour, ever ask your department to approve a label that did not have any net weight on it?

A. They may have because—and I may not have known about it.

Q. But from what you know, did they?

A. To my knowledge, no.

Q. Subdivision 3 talks about the net weight, and further down it talks, "And provided further that the total net weight of the contents of the shipping container shall be marked on such container."

There seems to be some difference here. They talk of net weight and total net weight, so that your department recognized the difference, is that right?

A. In one place we are talking about immediate containers, consumer packages, and the other place we are talking about a shipping container which contains, it may be half a dozen immediate containers.

Q. So that in the shipping container you refer to total net weight, and yet the immediate container, containing this poultry, must have net weight?

[fol. 159] A. Are you expecting an answer? Was that just a statement or a question?

Q. I was just wanting to repeat something. In other words, there is a difference in the regulations between net weight and total net weight.

A. No. There really isn't. That total there was written in to imply that the weight of the individual packages within this shipping container should be expressed as one total weight for the six packages or four packages. You omitted one statement here that we have to have certain agreements and signed documents from retailers to the packer, and we have copies of those in which they indicate that they will apply the net weight to the consumer package before the product is offered for sale, display or sale.

Q. You are referring to the first part where the administrator may waive the requirement of net weight.

A. That's right.

Q. They have to get some kind of assurance that the retailer will put it on.

A. That's right.

Q. But that can be done.

[fol. 160] A. That's correct.

Q. But wasn't done as far as you know by plaintiff, by either plaintiff here?

A. No, and I might add, sir—

Q. Would you please answer just yes or no?

A. It was not done.

Mr. Condon: Does that question refer to stuffed turkeys, Mr. Kahaner, or any product?

Mr. Kahaner: Well, stuffed turkeys I am referring to.

The Witness: The answer then would be it was not done. We were not requested by Swift & Co. with respect to this provision.

Q. There is also a provision here that where the label is turned down, as you testified to here, that the plaintiffs, Swift or Armour, or both, could have asked for a hearing.

A. That is correct. There is procedure in paragraph C on that.

Q. And even after being turned down after a hearing they could appeal such determination to the Circuit Court of Appeals.

A. That's correct.

Q. So that there is means for the plaintiff, for both [fol. 161] plaintiffs, to have challenged any one of your determinations as to the label.

A. The regulation provides for that and so does the Act.

Q. When you decided on net weight meaning total net weight, that was your own decision. Actually you did not find any particular definition of net weight in the regulations or Act of Congress. This was your own idea, your own interpretation.

A. Net weight is not defined in the law. It is not defined in the regulations.

Q. So this is your interpretation of net weight?

A. Yes. It is our interpretation of net weight.

Q. Do you know what the dictionary definition of net is?

A. I haven't looked it up recently.

Q. I did.

A. Obviously.

Q. And the dictionary definition of net is "free from everything extraneous."

Now, would you say that a stuffed turkey was free from anything extraneous?

A. Yes, if you remove the packaging materials, what is left is—

[fol. 162] Q. But the turkey, the stuffing is not extraneous?

A. Not to a stuffed turkey it is not.

Q. That is your interpretation, is that right?

A. It is the position of the Department in this case.

Q. You mean the position as interpreted by you in the department?

A. That's right.

Q. Did you know that New York State has a different interpretation?

A. Of net weight?

Q. Yes.

Judge Wyatt: Not a different interpretation, is it, Mr. Kahaner?

The Witness: It is not different.

Judge Wyatt: It is a different statutory provision.

The Witness: A different requirement.

Q. Are you familiar with 221.40 of the Regulations?

A. No, I am not, but obviously there is a difference.

Q. That is why you are here, is that it?

A. Probably that is why we are all here.

[fol. 163] Q. And you have been told about that difference in the interpretation or definition of net weight by the State authorities as against the interpretation of net weight by your department?

A. I have not been told. We haven't, to my knowledge, had any correspondence from the State authorities. I have heard some testimony here the other day indicating that there is this difference, but—

Q. Officially you do not know of any difference?

A. That is correct.

Q. Well, when Armour and Swift submitted these labels didn't they tell you that they were having difficulty—

A. That's right, they did; that is true.

Q. You did not let me finish. They were having difficulty selling their turkeys in New York State; is that what they told you?

A. Yes.

Q. So you knew that there was a difference?

A. Yes, I knew.

Q. And did your department make any attempt to straighten out this difference with the New York State authorities?

[fol. 164] A. Not to my knowledge, we did not.

Q. And yet you knew that New York State had a different interpretation as to net weight?

A. A different requirement for showing the weight on products, on poultry.

Q. Do you know—

A. Stuffed turkeys.

Q. Do you know as part of the Act that they ask you to cooperate with State officials in the enforcement of your Poultry Inspection Act?

A. Yes, sir.

Q. You know that?

A. That is correct.

Q. And you have done that many times, haven't you?

A. We have done that, yes, sir.

Q. And yet in this case it was not important enough for you to get together with the State authorities and see if you could straighten out any alleged difference of interpretation?

A. We did not get together. I mean perhaps it should have been, but if you have a law in the State books that requires one thing and we have a Federal law and the policy that is applied nationally, and it is contrary, I think [fol. 165] it would be desirable.

Q. Let me get this straight. You say it should have been done?

A. I think it would have been desirable to solve this situation in some manner so that products can move freely between states. That is, I think, one of the purposes.

Q. And your department is not interested specifically in declaring our State statute unconstitutional, is it?

A. Our department is not. We are here merely to explain our program.

Q. So that if anything could be worked out which would satisfy both, I mean in which you might give and take a little bit on interpretation, there would be no objection by your department to interpret this in a different manner?

A. Well, I don't know what the department's position might be in light of some circumstances that might be presented in the future, but as of right now I stated the policy of the department with respect to showing the weights of these combination foods.

Q. This is the policy in your department of certain [fol. 166] officials?

A. That is correct.

Q. But you cannot find anything for that being the policy of Congress, is that right, specifically as to net weight?

A. As to net weight, yes, I think you can find it if you look at the definition of product in the Act, and then if you look at the labeling requirement which says the net weight of the product must be shown on the container, so product is defined to mean any edible part of poultry or any additional ingredients that are used in—

Q. That is your interpretation.

A. That is the interpretation in the Act, I believe. It is defined here in the definition of poultry product in the law, the term poultry product, definition E.

Q. Yes, what does it say?

A. "The term poultry product means any poultry which has been slaughtered for human food from which the blood, feathers, feet, head and viscera have been removed in accordance with rules and regulations promulgated by the Secretary, any edible part of poultry or, unless exempted [fol. 167] by the Secretary, any human food product consisting of any edible part of poultry separately or in combination with other ingredients."

So that you have a three-part definition there of poultry product. You have the ready-to-cook poultry or any edible part of this, or this combination food.

Q. There is nothing in there that talks about weight It just describes what is edible.

Judge Friendly: Now aren't we just arguing? The witness has made his position plain.

Mr. Kahaner: All right.

Q. Mr. Hauver, what would you say if a packer, in packing, not stuffed turkeys, but ordinary turkeys, were to put a prize in the package, would that be part of the weight, say, a bottle of perfume for the housewife?

A. No, sir.

Q. You would not let that go into the package and be weighed as part of the net weight, would you?

A. No, sir.

Q. Suppose the time comes—I don't know whether it has happened now—

Judge Croake: We assume that perfume is not edible. [fol. 168] Why don't you select some edible item?

Q. Suppose we have stuffing that is dehydrated by the packer, and Swift and Armour took this dehydrated product in a package and added it to the turkey, just before weighing. Would you say that the net weight of the turkey should include this package of dehydrated stuffing that was separate and apart from the turkey?

A. The net weight in a product such as that, if it was merchandise such as that, and we have some products, the weight would be shown as the weight of the turkey. There would be some indication that something else is packed along with it, but the weight, this would be a turkey as a food product and the net weight would be the weight of the turkey.

Q. But you would not by any sense of the imagination include that package of dehydrated dressing as part of the weight of the turkey, would you?

A. Not if it is a separated package of dehydrated raw materials for the preparation of stuffing, no.

Q. No, it was not raw materials. You know how they scientifically do it today; they can take something, cook [fol. 169] it, dehydrate it, make it into a powder, and then package it and then when you cook it again it comes back into its original form, so that this is actually the same stuffing that goes into the turkey, but now it is dehydrated, by Pepperidge Farm or something, and then they sell it to Swift and Armour, and Swift and Armour, instead of going to the bother of stuffing the turkey, adds it.

Judge Wyatt: Yes, but the product is not a stuffed turkey, and it has not been stuffed; it could not be sold under that name.

Mr. Kahaner: But I am just asking whether—there is still stuffing there to be used in the turkey, and if you are going to use—if they say that stuffing is part of the weight of the turkey, then this package should be added.

The Witness: You expect me to answer?

Mr. Kahaner: Yes.

A. We were talking about a stuffed turkey. You are talking about the dry ingredients that might be used sometime by the housewife to prepare a stuffed turkey. But in this situation that you are presenting we would require the weight of the turkey to be shown, and there would probably be some indication on the package, the container, [fol. 170] to indicate that there is some dried prepared stuffing that is contained therein, but the weight of the turkey would be shown as the product, because that is the product at that point.

Q. Exactly. Now, would you say that there would have to be—wouldn't the total weight of the package have to be shown somewheres? Suppose this dehydrated stuffing weighed a pound or a half a pound? Wouldn't it be necessary to show it, even in shipping it, wouldn't the shippers be interested in knowing the weight of the package, the total?

A. I would imagine that this dehydrated stuffing would have the net weight of that stuffing on it, the individual—

Judge Croake: Could that be frozen, the dehydrated stuffing?

The Witness: I think it would be crumbly; it would be too dry, really. It would have to be, as I see it— I cannot visualize a product like this because, to my knowledge, there is none on the market, none that we have had any dealings with on poultry. I know there are some other combinations.

Q. But if that thing happened, if such a product was prepared, you would definitely not permit that box of de- [fol. 171] hydrated stuffing to be added as part of the net weight of the turkey?

A. That's right, as long as the turkey is labeled turkey, it would be extraneous to that product.

Q. So that net weight in this case would be the turkey solely?

A. If the product is labeled turkey, the net weight would be the weight of the turkey solely.

Q. You were talking about some exception by your department of these Rock Cornish hens that have been shipped in interstate commerce from Connecticut to New York and to other parts of the country, and they have a label which specifically sets forth the weight of the hen and the weight of the stuffing and the total net weight, is that right?

A. Yes, sir, they had.

Q. And they obtained approval from your department?

Judge Friendly: Perhaps we may as well adjourn now for five minutes.

(Short recess.)

Q. I believe before the intermission that we were talking about the exception, that you said that there was a plant that was stuffing poultry that had received permission from [fol. 172] your department to separately state on the label the net weight of the bird and then the total net weight, is that right?

A. I believe the weight of the stuffing, the weight of the bird and the total weight of the product.

Q. Well, I show you this from the Idle Wild Farm which has got your inspection approval on, which has been shipped by Idle Wild Farm.

Judge Friendly: Do you want to have that marked for identification?

Mr. Kahaner: Yes.

(Defendant's Exhibit D marked for identification.)

Q. Will you take a look at this and see whether you are familiar with this label?

A. Yes, sir.

OFFERS IN EVIDENCE

Mr. Kahaner: I offer that in evidence.

Judge Friendly: Have you seen it, Mr. Condon?

Mr. Condon: I have not.

Judge Wyatt: This is the label to which you referred before, Mr. Hauver?

The Witness: Yes, sir.

Judge Friendly: It will be received.

(Defendant's Exhibit D received in evidence.)

[fol. 173] Q. Now, Defendant's Exhibit D contains the net weight; there is a labeling on it or a stamp on it containing the net weight of the bird and the total net weight of the Rock Cornish hen, is that right?

Judge Wyatt: Where is it? I don't happen to see it.

A. Well, on this one it is shown right here, net weight, bird, one pound, but I don't have—my files do not show this particular one. My files show something like this, where we have the net weight, bird and stuffing and total, and this was obliterated on the way we approved that one.

Q. So that that package of Idle Wild Farm with reference to their Rock Cornish game hen specifically states two weights, is that right?

A. It actually states three weights, weight of the stuffing, weight of the bird and the total.

Q. Well, will you look at that again and tell me how many weights are stated there?

A. Net weight, bird one pound. Stuffing, 4 ounces. Total, one pound, 4 ounces. That, to me, is three.

Judge Wyatt: In fact, it is printed on this exhibit so that there is no individual weighing contemplated, I assume.

[fol. 174] Mr. Kahaner: I did not get that, your Honor.

Judge Wyatt: The label has the weights printed on the label, so that it is not contemplated, apparently, that there will be any individual weighing. I do not know how they make it come out uniform, but that is apparently—

The Witness: Well, may I answer that?

Judge Wyatt: Certainly.

The Witness: Some firms pack products to exact weights, like one pound packages of chicken legs, two pounds or a pound and a half pack.

Judge Wyatt: It can be done?

The Witness: Yes, sir. It takes a lot of juggling of parts on the line to get them to exact weight, but it is done. You see it in grocery stores.

Q. And Defendant's Exhibit D was approved by your department, wasn't it, this label?

A. At one time we gave a temporary approval for labels showing those weights, yes, sir.

Q. When was this approval given, do you remember?

A. I don't recall the exact date, but this firm has been in operation for some time. They were one of the first in this business, I believe, of Rock Cornish game hens, but it was terminated July 1.

[fol. 175] Q. I see. But at the time you gave it approval, temporary or otherwise, there was submitted to you an application in the same form as Armour and Swift, is that right?

A. That is correct.

Q. And did you process that application?

A. No, I did not, but our people did, people charged with that responsibility.

Q. And they approved this label with the separate weights, is that right?

A. Yes.

Q. They did not come to you or anybody else to question the wording on the label or the different weights on the label, did they?

A. I believe, sir, at the time this was originally approved I was not in my present position so that I would not have been contacted.

Q. Well, then, the person who was in your present position approved this label?

A. They may have had knowledge of it. The label was approved, I am sure, by our Poultry Products Section, the inspection branch.

Q. And nobody brought up the question of confusion at that time, did they?

[fol. 176] Q. When a label is submitted, as I pointed out earlier, the exact procedure is described as to just how the product is packed, so that our people had knowledge that there was an opportunity to be reasonably assured that the statements on that label are accurate by virtue of this exact hand portioning procedure that this firm used.

Q. You do not know of your own knowledge whether that is so, do you?

A. I have not seen that operation.

Q. You were not even in that position to know about it, to what you just testified. You said you were not even in that position.

A. I am in a position to accept as reasonably accurate the statements of our employees.

Q. But I am just saying about the approval of this Rock Cornish game hen, the label on it, you said—

A. At the time that this was approved?

Q. Yes.

A. I probably was not in my present position.

Q. So you do not know what caused them to approve it at that time?

A. We have discussed this matter with our people who were in on the approval and considerations involved in [fol. 177] making this decision to temporarily go along with this deal to see if it would work out.

Q. Oh, then you did participate in giving approval to this label?

A. I did not personally, but I have talked with people who did consider it and were in on the discussions. I have talked to them since I have been in my present position.

Q. Do you know how many labels were printed by Idle Wild Farm containing this stamp, the approval here?

A. I do not know.

Q. Do you know whether Idle Wild Farm is still in business?

A. Yes, sir.

Q. And are they selling Rock Cornish game hen, stuffed Rock Cornish game hen?

A. I don't know if they are. I imagine that they are.

Q. And are they using, do you know whether they are using these boxes containing the separate weights and also the approval of your department?

A. They were, as I testified earlier, up until last week, but I know as of now they are—no product that is packed [fol. 178] showing separate weights is being distributed from that plant.

Q. So up until this past week Idle Wild Farm was actually selling stuffed Rock Cornish game hen with the approval of your department of separately stating the net weight of the bird and the stuffing and the total weight, is that right?

A. No, they were not.

Q. You mean they were in violation of law?

A. They were not packing in accordance with the conditions of approval of the label. We disapproved the label July 1, 1963.

Q. And they were supposed to—

A. They were supposed to obliterate it. We gave them temporary approval to use up some of their stock provided they would obliterate the net weight and show only the total net weight. They obliterated, I am informed by our inspector, the printed matter, but they added an additional label with the information which had not been approved so, in effect, they were operating without an approved label from the period July 1 up until—

Q. It is more than seven months or something.

A. Close to eight months.

[fol. 179] Q. And your inspector permitted them to ship this label or this package in interest commerce and putting your inspected sign on it?

A. Yes, he did. He fell down on the job.

Mr. Kahaner: I have here copies of the approval of Idle Wild Farm and I would like to offer them.

Judge Friendly: Have them marked.

Mr. Kahaner: Mark them for identification.

(Defendant's Exhibit E marked for identification.)

Q. Would you look at these and say whether these are the photostats of the actual applications for approval by Idle Wild Farm of its label?

A. These are the papers, yes, that we approved.

Mr. Kahaner: I offer them.

Judge Friendly: Any objection?

Mr. Condon: I would like to see them first, if I may. I have no objection.

Judge Friendly: Received.

(Defendant's Exhibit E received in evidence.)

Mr. Kahaner: I have no copies of those, your Honor. May I see them?

[fol. 180] Judge Friendly: Surely.

Mr. Kahaner: Thank you.

Q. The first one, the first application, which is dated October 1, 1963, has a stamp of your department on it, "Temporary approved March 26, 1963," and at the bottom of the statement there is a statement, "There would be no objection to showing the weights of the stuffing in bird if they were shown separate from the net weight statement." Is that right? Is that what this statement says?

A. That is what that statement says, yes, sir.

Q. So that your department on March 26, 1963, specifically approved the application of Idle Wild Farm to have a label separately stating the weights of the stuffing and the bird?

A. Correct.

Q. March 26, 1963, what position did you hold at that time?

A. The same position I have now, Deputy Director of the Poultry Division of the Agricultural Marketing Service, United States Department of Agriculture.

Q. Was this application submitted to you before it was approved?

A. No, sir.

[fol. 181] Q. Well, was it submitted to you because nobody felt that there was anything different about this application than others?

A. It had been previously approved on this temporary basis, and there was no real change from what had been previously done with respect to this product and this label.

Q. How long previously to March 26, 1963, had it been approved?

A. I do not know.

Q. Had it been previously approved, did you say, in 1962?

A. I don't have the dates in mind, but I am of the recollection that they had been packing this product for several years.

Q. And it also says here, on this application, that temporary approval is issued to October 1, 1963.

A. That's correct.

Q. Then the next thing we have is a—

Judge Wyatt: Excuse me, is that the one that was withdrawn effective July 1, 1963, Mr. Hauver?

The Witness: It was at a later date, but not in this sequence.

Judge Wyatt: Although by its terms it ran to the first [fol. 182] of October, before the first of October it was terminated effective July 1st?

The Witness: That is correct.

Q. Now, on June 24, 1963, we have another notice here to the Idle Wild Farm where they say, "Temporary approval, 60664," which refers to the March 26, 1963 date, "is hereby terminated effective July 1, 1963."

Is that what you were referring to? Is that the answer to Judge Wyatt? You can check on that.

A. Let me see this one. Well, this was terminated at July 1, 1963.

Q. That is what I just said.

A. That's right.

Q. And it says here at the bottom, "The net weight statement should be shown as the total net weight. The weight of bird and weight of stuffing may not be shown."

Then the next paragraph says, "The net weight shown in this manner would be confusing to the consumer. Furthermore, this type of net weight declaration would require two weighings," is that right?

A. That is what it says there.

[fol. 183] Q. "The initial weight of the bird would have to be kept on each bird until it was stuffed, packed and reweighed. The confusion which might result from such procedure could result in improper weights being shown on the product."

Everything is could, might; that is how your department processed this application, is that right?

A. That is correct.

Q. Did you see this?

A. No, sir.

Q. Was this submitted to you prior to a determination?

A. That one was not.

Q. Now we have the third application, which is dated February 29, 1964, which is after the supposedly terminated date which is stated on the previous application of July 1, 1963, and this is marked "Temporary approval" by your department to Idle Wild Farm, Pumpfret Center, Connecticut, and it is dated August 23, 1963, and lo and behold we have "Temporary approval is issued to February 29, 1964."

A. That's correct. On the condition that this weight be obliterated as shown on the label that they submitted. That [fol. 184] is why you need labels to go with those pieces of paper to show just what we were talking about insofar as our labels. Now, mine happens to show that.

Q. Usually they are specific when they say something, are they not?

A. Because this label was submitted here and the firm had obliterated this information.

Q. Is this the label that was submitted?

A. That is correct, and that is where it says it is extended to February 29th. It is this one that was August 23rd, and they submitted a label showing the product obliterated, I mean the net weight of the stuffing obliterated, and we commented, "Yes, we will extend the temporary approval of this label so handled until February 29th."

Q. Well, suppose I were to tell you that the manager of Idle Wild Farm said he has been selling and shipping stuffed Cornish game hens with the same labels he has had from last year?

Judge Friendly: Is that a question?

Mr. Kahaner: Yes.

Q. Would you say that that was so or not?

A. That is probably correct.

[fol. 185] Judge Wyatt: He said he stopped last week, as I understood it.

The Witness: That's right. We approved a label which showed the obliteration. The firm added another sticker showing the weight. It was not approved.

Q. The reason for your stopping, which you say happened last week, did you get any complaints from consumers that you were confused?

A. Our reason for stopping—

Q. I am asking did you get any complaints from consumers?

A. No.

Q. Although this product had been shipped for several years in these containers containing the separate weights, your department had never received a complaint from any consumer that they were confused?

A. To my knowledge, no.

Q. May I suggest that the reason you became so concerned is because this case was coming on and you would be embarrassed; is that why you suddenly stopped these people from shipping these Rock Cornish hens?

A. No.

Q. It had nothing to do with this case?

A. Nothing to do with this case, but it had something [fol. 186] to do with stuffed turkeys in general, because we had had some correspondence and some requests to show weight of stuffing and weight of the bird.

Q. From whom?

A. From Armour and from Swift & Co., and we, on the basis of the operating procedure in force in those plants, we made a decision that we could not accurately attest to the information as far as weights are concerned, and we arrived at a position that we would apply this policy uniformly across the board to all products regardless of whether they were stuffed turkeys or Rock Cornish hens or stuffed roasting chickens. That is why we made this determination because of the interest that had been shown, and we examined it and it was our position that we could not—

Q. Didn't Armour and Swift get after you and say, "How come you are permitting Rock Cornish hens, the labels to be stated differently with separate weights and not us"?

A. No.

Q. They did not?

A. They did not get after us.

Q. They did not bring it to your attention?

[fol. 187] A. They may have.

Judge Croake: Did they advance the argument?

The Witness: The point is, it was called to our attention because we had taken a position on stuffed turkeys, and we immediately reviewed our label files and we discovered we had this one that was approved temporarily, so we felt that we could not have a policy for one thing and a different one for another, so we took the position of not allowing, of requiring and permitting only the total net weight of the product.

Q. But you had experience with Rock Cornish hens where the consumers were not confused and you had no complaints; why couldn't you have changed your operation to permit Armour & Co. and Swift to comply with the separate weights so long as you had the natural experience with Rock Cornish hens, that there was no confusion?

A. That was a different type of processing, as I pointed out earlier, entirely because it is actually done by hand, and on the other stuffed turkeys it is done by a machine; there is considerable variation in the amounts. That was pointed out here the other day, and as I have seen in actual practice. That is the reason for the difference in the two operations.

[fol. 188] Q. Well, didn't anybody in your department think it necessary that since the Rock Cornish hens had not caused any confusion to the consumer that you would ask Swift and Armour to set up some kind of a testing to see how they would do it instead of in a cavalier fashion just to refuse to permit them to do it?

A. Well, in the first place, knowing the operation, knowing the opportunities for incorrect weights, we took that—

Q. What do you mean you knew? Did you ever test to see whether this double weight would show up as incorrect?

A. I answered no to that.

Q. That's right. So on the experience that you had there was nothing based on experience that you would come to that conclusion. As a matter of fact, from the experience with the Rock Cornish hens it would show that there was no confusion.

A. It would show we did not have any, did not receive any letters from consumers.

Q. As a matter of fact, did you ever receive—did your inspector at the plant of the Idle Wild Farm ever complain to you?

A. Not to my knowledge.

[fol. 189] Q. So that he found everything right in his inspection at their plant, at the Idle Wild Farm?

A. He did not report that he found it wrong.

Q. So even based on that, you would not take his word—

Judge Friendly: Haven't you squeezed this lemon pretty dry, Mr. Kahaner? I think we all have the point.

Q. Then this policy of "Yes" and then again "No" is something your department decides one day and maybe next day they will change their mind, is that it?

A. No. We entered into this Idle Wild deal, and as I pointed out earlier, on an experimental basis, on the basis that it looked as though there would be not too much difficulty in controlling it.

Q. So as to Idle Wild you said yes?

A. All right.

Q. As to Armour and Swift you said no?

A. It was then entirely different—

Q. Did you say maybe they could do it?

A. I don't recall.

Q. Did you give them an opportunity to say, "Show us, prove to us something that might show there is confusion or not confusion"?

[fol. 190] A. No.

Q. You just out of hand refused to permit them?

A. That's correct.

Q. And they probably pointed out to you that Idle Wild Farm was—

Judge Croake: Mr. Kahaner, is not the question whether or not any attempt was made to reconcile the problem created by the regulation in the State of New York which was contrary to that established in the Department of Agriculture? Isn't that our problem?

Mr. Kahaner: Pardon me?

Judge Croake: No attempt was made by the Department to reconcile the problem.

Mr. Kahaner: Yes.

Judge Croake: Did you ask him that?

Mr. Kahaner: Yes, I did.

Judge Croake: When?

Mr. Kahaner: Before the intermission. He said no attempt was made to reconcile.

Judge Croake: Well, isn't that the point?

Mr. Kahaner: I just want to show how their department, the Federal Department, could be arbitrary.

Judge Friendly: Well, you brought out your point, I think, very effectively, that in the one they did not make [fol. 191] any tests and so forth, and on the Armour and Swift they adopted a different policy. Can't we get on? I think we see your point.

Q. Do you know what the policy of your department with reference to meat is?

A. No.

Q. As to weights. I show you—

Mr. Kahaner: I offer this for identification.

(Defendant's Exhibit F marked for identification.)

Mr. Kahaner: I am through with this now. Would your Honors like to see it?

Q. Would you say this was a copy of a letter that was sent to Canada Packers from Mr. Mathis?

A. It looks like a letter that was sent to Canada Packers by an officer of the Meat Inspection Division, Department of Agriculture.

Mr. Kahaner: I offer that.

Mr. Condon: I am going to object to it as completely irrelevant. There is no issue involved in this case with respect to the Meat Inspection Act.

Mr. Kahaner: I am offering it to show the policy of the Department of Agriculture, and that is what their—

[fol. 192] Judge Friendly: We will receive it. Mr. Condon can bring out why it is irrelevant in his view when he takes the witness over, if it has not been covered by that time.

(Defendant's Exhibit F received in evidence.)

Q. Mr. Hauver, I will just read the letter. It is sent to Mr. Basil M. Vastola, care of Canada Packers, and it is from the United States Department of Agriculture, Agriculture Research Service, Meat Inspection Division, Washington, D. C.

It says: "This is in reply to your letter of November 29, 1962 concerning your proposal for marking the weights of garnished hams to be sold in the City of New York. Your proposal is to show two net weights. The first was to be entitled 'the net weight, including garnishment.' In another block you are to show the net weight of the ham. We are in agreement with your proposal and will accept this method of marking weights for this type of product marketed in the City of New York."

Now, it would appear from this letter that your own department—well, not your department, but the United States Department of Agriculture, the Meat Inspection Division, permits in the sale of garnished hams, two weights, is that [fol. 193] right?

A. It would appear from that letter.

Q. Well, does the right hand of your department know what the left hand is doing?

A. Yes, sir; they do not permit the two weights, I have been told. I have been in touch with the Meat Inspection Division. That letter has been recalled. They have never approved a label showing ham with two weights on it. That was an expression of an officer who worked at that time in that division.

Q. Well, suppose I were to tell you, Mr. Hauver, that in discussion with Mr. Vastola he said he was shipping garnished hams with two weights, approved by your department; would that change your mind?

A. It wouldn't change my mind. I am telling you what I was informed by the man I talked with who is in charge of the labeling section of the Meat Inspection Division.

Q. Suppose I would tell you that in discussing this with one of your men in your department he told me that is true, they have a different way of marking net weight, and they permit two weights, but that Poultry for some reason or other, fearing bacteria, has decided not to permit double [fol. 194] weights.

Mr. Condon: Object to this unless we get some identification whether or not it was said and by whom.

Judge Friendly: Well, he has been asked whether this talk with an unidentified man would change his testimony about something. I just don't know what the "something" is.

Mr. Kahaner: Well, the witness has testified that this letter does not mean what it says.

Judge Friendly: He has testified it was recalled. I suppose we can assume you are asking him whether the incident to which you are referring would cause him to change his testimony, if the letter was recalled, is that right?

Mr. Kahaner: That's right.

Judge Friendly: You may answer that.

The Witness: It would not change my testimony.

Q. You are positive that at the present time—

A. I am positive what the man told me, that the letter was recalled.

Q. A man told you?

A. An officer in the Meat Inspection Division.

Judge Friendly: It might be well to give his name.

[fol. 195] The Witness: Dr. DeHoll.

Q. And he specifically told you that this letter was recalled and that Canada—

A. Or a new letter had been written countermanding that.

Q. When did you speak to Dr. DeHoll?

A. Oh, it's been a month ago. Maybe longer.

Q. I see. So you have gotten very busy talking to all these people as a result of this case, is that right?

A. No, that isn't true. We tried to coordinate and be consistent between meat and poultry inspection in our label approval policies.

Q. Well, are you usually consistent?

A. Yes, sir, we try to be.

Q. If the Meat Inspection Department approves a label showing two weights would that be consistent with your—

A. Depending on the type of operation and whether or not we can satisfy ourselves that the information was accurate and could be verified on the basis of test weighing the finished product.

Q. So that the people at the Meat Inspection, if they are [fol. 196] satisfied that double weights would not confuse the public, could approve it?

A. I am not qualified to speak what the Meat Inspection people would do on the basis of these assumptions that you are making here.

Q. Well, you just said that there are certain conditions where they would approve.

A. I did not say they would.

Q. They might?

A. I don't know. I was told that they were not approving dual weights on products.

Judge Wyatt: Are you asking us, Mr. Kahaner, to assume that the problem with garnished hams and the problem of stuffed turkey is the same?

Mr. Kahaner: Well, I haven't heard—that is what the witness is testifying to.

Judge Wyatt: I don't know. Is that what you say, Mr. Hauver, that the problem is the same as far as garnished ham and the stuffed turkey is concerned?

Mr. Kahaner: That is what he said.

The Witness: It is a similar problem, I believe, because you do have a migration, and it is the difficulty of check [fol. 197] weighing at the end, in the enforcement processes, to determine just how much is garnished and how much is ham, because you have intermingling of the garnishment and the meat.

Q. Do you know of your own knowledge whether garnished hams or any meats containing anything added are being sold, are being approved by the U. S. Department of Agriculture, Meat Inspection Division?

A. I do not know of my own knowledge.

Q. Could there be?

A. I would assume so, because I have seen them in the stores, it seems to me, on holiday times, hams with glaze and pineapple and cherries on it.

Q. So they actually have the approval of your department, is that right?

A. I don't know how the weight is expressed on them, sir.

Q. You are sure you don't know how they are weighed?

A. No.

Q. Are you sure they don't have the double weight?

A. I am not sure. I only know what—

Q. Did you ever look at them?

A. No, I have never looked at them.

[fol. 198] Q. Weren't you interested in noticing whether this was permitted by your department, a double weight on the garnished hams?

A. Not to the point of going to stores and seeking out products. If it would come to my attention certainly I would probably have a curiosity interest in it, but not to make really a special effort to find out. As a consumer.

Q. Weren't you interested to know whether this doctor you mentioned was telling you the truth?

A. I had no reason to doubt the man so I do not make it a policy of proving a man is right.

Q. Then you are not interested in the Meat Inspection Division as to their policy on double weights?

A. Surely. We have an interest there. We try to be consistent, where that is in order.

Q. So, in trying to find out whether your department and the Meat Inspection Division was consistent you did not think it necessary to look at these garnished hams to see whether they were separately stated as to weight?

A. Well, I wouldn't know actually where to go to find one at the time this happened to come up. It is usually [fol. 199] a holiday item, and we were just merely checking out policies that they followed at the time we arrived at the policy we were going to apply possibly.

You see, this thing is more important than just stuffed turkeys. We are concerned with dinners and chicken and noodles and pies and all those items.

Mr. Kahaner: I move to strike it out, your Honors, as not responsive.

Judge Friendly: We will let the answer stand.

Q. We are talking about stuffed turkeys and Cornish game hen and garnished hams, is that right? A month ago, although this letter is dated December 7, 1962, you did not do anything about it until a month ago you questioned the doctor about it, is that right?

A. I don't know. No, I think it must have been back in July and August when we were concerned with this, because that is when some of these letters, this stuffed turkey deal was being considered, and it is when these other approvals were terminated.

Q. Well, wasn't it at the time my answer came in and set forth these different approvals of Rock Cornish game [fol. 200] hen and garnished hams that you became busy?

A. I am not familiar with anything, anything that you—

Q. Well, didn't Swift and Armour tell you, their attorney or representative say to you, "Well, what goes here? Here you have your Meat Inspection Division permitting it. Here you have Rock Cornish game hen. Do something about it."

A. They never mentioned to me anything about the Meat Inspection Division or what they did. They talked poultry problems any time I had discussions with them.

Q. Well, this letter was attached to one of my papers that were served on the counsel to the Armour and Swift companies.

A. Well, I haven't seen it.

Q. What made you go a month ago, as you said, to this doctor to find out?

A. I would like to correct that and say it must have been earlier than that, possibly eight months ago, back around July and August of 1963, because we did touch base with the meat inspection people in order to see and help [fol. 201] guide us in the policy that we developed with respect to these combination foods and the showing of multiple weights on combination foods.

Q. Mr. Hauver, are you familiar with the President's concern in that consumer bill which is entitled The American Consumer in his message to Congress? Are you familiar with that message?

A. I am familiar vaguely; certain parts of it I am rather familiar with.

Mr. Kahaner: I offer this for identification, the message from the President of the United States.

Judge Friendly: You don't need to offer that. You may refer to the document.

Q. You know President Johnson was concerned with the consumer, is that right, and he sent this specific message to Congress highlighting all these different things that the consumer should be protected in drugs, in food and all that; you are familiar with that, are you not?

A. That's right.

Q. On page five of this pamphlet it says, "Truth in packaging."

It says "We all like interesting packages and we are at-[fol. 202] tracted by them. In today's markets they are the silent salesmen for their products. But salesmen should be both helpful and truthful. When the American housewife comes face to face with one of these silent salesmen she wants it to report to her the nature"—and this is underlined —"and quantity of its contents in a manner that is simple, direct, visible, accurate. All too often she cannot find such labeling today."

Then again it says: "We do seek packages that are easily understood and compared with respect to sizes, weights and degrees of fill."

Then it says: "Packages themselves should take the initiative in this effort. It is in the best interests of the manufacturer and retailer as well as the consumer."

Now, where the packages are separately stated as to the net weight of the turkey and the net weight of the stuffing, would that be informative to the consumer?

A. If it were correct it would tell her more information than she would have if she just saw the total, if it were correct.

Q. So you agree with the President on this?

A. I agree with the President very definitely, and that [fol. 203] is the policy we follow in the Poultry Inspection Division branch.

Q. And yet, in spite of that agreement—

Judge Croake: I think we all agree with that expression, the expression of policy.

Judge Friendly: Well, on that note of all being on the side of the angels, why don't we adjourn for lunch?

We will recess until two o'clock.

(Luncheon recess at 12:45 p.m. to 2:00 p.m.)

[fol. 204] Afternoon Session

William E. Hauver resumed.

Mr. Kahaner: May I?

Judge Friendly: Yes, proceed, Mr. Kahaner.

Cross examination.

By Mr. Kahaner:

Q. Mr. Hauver, when we took a recess you were talking about the Presidential report to Congress and his concern with consumer packaging; you remember that, don't you?

A. Yes, sir.

Q. You said you were in accord with his views; is that right?

A. Yes, sir.

Q. Subsequently, we have a report called the Joint Economic Report, 1964—

Judge Friendly: Is this really going to get us anywhere? I assume some of these things do not have any legal effect. What has this got to do with the case?

Mr. Kahaner: I am just trying to show the concern of the President and Congress.

Judge Friendly: We can take judicial notice of it. Just give us a reference. I do not think whether the witness [fol. 205] agrees with him or does not agree with him is of any particular moment.

Mr. Kahaner: Then I would like to refer to the 1964 Joint Economic Report of the Joint Economic Committee, Congress of the United States, under January 1964 Economic Report of the President, with minority and additional views. And on page 12 thereof, under Consumer Protection, there is a statement on Truth in Packaging Legislation.

Judge Wyatt: Statement by whom?

Mr. Kahaner: By the Economic Committee.

Judge Croake: What is the date of that?

Mr. Kahaner: It is dated March 2, 1964, and it discusses truth in packaging.

Judge Wyatt: What is this, a committee appointed by the President? An advisory committee of some sort?

Mr. Kahaner: This was the committee appointed, Joint Economic Committee of the Congress of the United States. I presume that was both Houses after the President—

Judge Wyatt: Oh, it is a committee of the Congress.

Mr. Kahaner: Yes, after the President made his report, [fol. 206] and this was their report in reference to his message on consumer protection.

By Mr. Kahaner:

Q. Mr. Hauver, I just want you, with reference to Defendant's Exhibit E, or I am asking you to read at the bottom of the statement. I am only referring to the middle one which is on the temporary approval, June 24, 1963.

The notations are on all three, but this does not seem to be obscured. Will you read that, please (handing).

A. The bottom paragraph?

Q. No.

A. The whole thing?

Q. Right here (indicating). The printed part of the application.

A. "Any approval of or comment concerning this labeling material or the wording thereon as contained in this notice must be understood to represent the attitude of this service only and does not excuse failure to comply with other applicable federal or state laws or city or municipal regulations."

Q. So that specifically advises the applicant that even [fol. 207] though you approve a label he may still have to comply with other regulations and laws of the state or the federal?

A. That is correct.

Q. The approval here is not supposed to give him the right to take your approval and shove it down the throats of other state departments?

Mr. Condon: I object to this.

Judge Friendly: Sustained.

Q. Mr. Hauver, are you familiar with the consumer reports put out by the Consumers Union?

A. I know—yes, I am. I see an article every once in a while.

Q. They are a well known organization. I understand they have over four million readers and they have over 900,000 members belonging to this organization, they are known throughout the United States; is that it?

A. That's correct.

Q. Have you seen the report dated February, 1964 with reference to stuffed turkeys and stuffed pounds? It refers specifically to your department and your approval.

A. May I see that, please?

Q. Yes (handing).

[fol. 208] A. Yes, I have seen this.

Mr. Kahaner: May I read from the report?

Judge Friendly: Yes, sir. I suppose you are going to ask the witness something about it.

Mr. Kahaner: Yes.

This report is in, as I say, the February 1964 magazine.

"It's CU's guess (not supported by the meat packers concerned) that a number of consumers must be disappointed each holiday season when they get their turkeys home from the supermarket. Those who have ordered frozen ready-stuffed turkey will find that the 'net' weight figure on the label doesn't mean just turkey—it includes the weight of the stuffing.

"This curious department from the normal canons of net weight labeling is actually required by Federal law; the U. S. Department of Agriculture, which inspects and certifies the processing of labeling of poultry, will not approve any label that gives separate weights for bird and stuffing, on the grounds that its inspectors 'cannot check the weight of stuffing in an already stuffed bird.' Why can't they? Because of a 'shortage of personnel', says the [fol. 209] USDA."

That is your department.

"Clearly, with gross weight labeling such as this, the consumer cannot compare either quantity or price. In one case that has come to CU's attention, the gross (labeled) weight of a stuffed bird was 7 pounds 4 ounces, but the weight of the turkey was only 5 pounds 2 ounces; the rest—2 pounds 2 ounces (nearly 30 per cent)—was stuffing. For a turkey this size, two-thirds of this amount of stuffing is recommended on the package of Pepperidge Farm poultry stuffing.

"Stuffed turkeys have been on the market now for several years, but this anomalous labeling situation remained unchallenged until two years ago when Swift & Company started to sell frozen stuffed turkeys, labeled according to Federal laws in New York City. The City's Division of Weights and Measures moved in under a State statute that demands that weight of stuffing and bird should be given separately, and a local court ruled that

Swift had violated the State labeling law. Whereupon Swift, with Armour & Company, applied to a Federal Court [fol. 210] for an injunction to prevent the State from enforcing its labeling law, on the grounds that it conflicted with Federal law.

"The case is now awaiting trial. Whatever the courts may hold, it seems to CU that the USDA is not considered the consumer's interest in this matter; the regulations governing weight albeling of stuffed poultry may be convenient to meat packers and Federal inspectors, but they are certainly not helpful to consumers."

Q. What would you say as to this report; is that a fair statement, fair opinion, as to the Federal Labeling Act?

A. The bulk of that article is essentially correct. I cannot draw the same conclusion and do not agree with the last paragraph or so there, where it implies that the Department is not concerned with consumers' interests, because, as I stated earlier, we are very definitely concerned in consumer protection.

Q. But you feel that the Department would be better concerned with this consumer if the label on the stuffed turkey would separately state the net weight of the bird and then the total weight?

A. No, I don't feel that way.

[fol. 211] Q. Well, didn't you just testify before that you thought that would be good protection if it could be done, you know, without too much confusion, but that would be very helpful to the consumer?

A. I testified to the fact that that would be additional information that some consumers might want to know.

Q. Wouldn't it be helpful to the consumers, to every consumer?

A. It might be if it were factual and could be correctly stated and the labeling was truthful.

Q. So that type of label would be more helpful and more honest than the label approved by your Department?

A. I think our label is honest—

Q. I am asking, would it be more so, for the help of the consumer?

A. Some consumers.

Q. What do you mean by "some consumers," those that graduate college, or some that just don't go to high school or public school? What type of consumer wouldn't be helped? You have two classes of consumers?

A. No, I don't. I think some consumers are more curious as to the labeling information that is on packed products [fol. 212] than others.

Q. You mean some consumers do not care what they pay for anything—

A. Some are very—

Q. Let me finish.

You are inferring that some consumers do not care what the package contains, they will pay anything anybody asks them; is that it?

A. No, I didn't say that. I wouldn't agree with that.

Q. What type of consumer would be helpful with the State label and what type of consumer would be more helpful with your label?

A. Some consumers are more prudent buyers than others, and they are looking for all the information they can get.

Q. And of those prudent buyers, aren't they helped by your label?

A. They have the net weight of the product shown, yes. But if they want it broken down—

Q. They have the net weight of the turkey, the meat, combined with the stuffing?

A. That is correct.

Q. That does not tell them the net weight of the turkey? [fol. 213] A. By itself, no.

Q. In other words, in the example cited in the Consumers Report, you had 5 pounds 2 ounces of turkey and 2 pounds 2 ounces of stuffing. Now, that was approved by your Department?

A. That is correct.

Q. Is that helpful to the consumer?

Judge Wyatt: You mean assuming that is the fact?

Mr. Kahaner: Yes.

Judge Wyatt: Your reading the statement does not mean it is so.

Mr. Kahaner: He said it was.

The Witness: Essentially correct.

Judge Wyatt: He said there was an instance where the stuffing weighed 2 pounds.

Mr. Kahaner: That is what he said.

Q. Now, in that—

A. I don't know about this incident. I don't know what that person is quoting.

Q. Will you at least be specific? You told me you did.

Judge Friendly: There could be such a situation?

[fol. 214] The Witness: There could be such a situation.

Judge Friendly: Can't we get on from there?

Q. I notice you keep looking over at Mr.—

Judge Friendly: Oh, we haven't any jury here.

Judge Croake: Do you know the identity of the author of that letter?

Mr. Kahaner: No.

Judge Friendly: Do you know where the author got the information? Do you know where the author of the article got the information about this pending litigation?

Mr. Kahaner: They got it from—

Judge Croake: You or who?

Mr. Kahaner: They knew about the litigation with the City, and they heard that they had instituted litigation against the State, and I had been in contact with the editor and she told me specifically about this article and she had checked it.

Judge Croake: All right.

Mr. Kahaner: I can get her here if it is necessary, if there is any question about it.

Judge Croake: We assumed as much.

Q. Well, in this type of a case, where there is turkey [fol. 215] that had stuffing that weighed 2 pounds 2 ounces, would you say that the housewife expected to have a turkey of 5 pounds having 2 pounds of stuffing? Would that be normal?

A. That would be normal. That's what we would consider. We approved a label, a formula, as I recall, for a product in this area to contain—as much as 25 to 35 per cent of the total weight of the stuffed product could be stuffing. And this, if it figures out as you said, around 30 per cent, would be within the approved formula for this product.

Q. Well, it is more than a third. You get a 5-pound 2-ounce—

Judge Friendly: We are talking about the total.

A. The total weight of the product, 7 pounds something.

Q. 2 ounces.

A. And you divide that and it will probably figure out within the formulation that has been approved for this particular product, I think.

Q. According to the information as set forth by this Consumers Union article, they do not think it was a proper [fol. 216] stuffing, the weight. It says here that "Even Pepperidge Farms thinks that that was too much stuffing."

A. Well, I mean—

Q. And yet you say your Department says it is OK?

A. We approved the label and we considered it to be within reason; otherwise, we would not have approved it.

Q. When you approved your label, you saw the total weight of the bird, you did not know how much stuffing was in it?

A. We saw the total weight of the product which is stuffed turkey, and we have the ranges of stuffing that go into the birds, and they vary with this category of birds, this weight class, from somewhere in the vicinity of 24 to 30 per cent, as I recall. And the label was approved on that basis and this one complied.

Q. Well, the label that you approved just gives a total net weight. You do not indicate any weight of stuffing that the housewife can say, "Well, this bird has got 30 ounces of stuffing."

A. That is correct, we do not.

Q. Whether it had 5 ounces or 3 pounds, too. I mean, things like that could happen. There is nothing on the [fol. 217] label that would indicate to the housewife how much stuffing is in there?

A. That's true, there is nothing there.

Q. Suppose this housewife had company and she wanted to make sure she had enough turkey and she figures, well, she only puts in, say, a 5-pound turkey, she puts a pound of stuffing in. Wouldn't she be embarrassed at the dinner table if she tried to serve this and it was a pound of meat less than she anticipated?

Mr. Condon: I object to that, if I may.

Judge Friendly: We will sustain it. You make good points, Mr. Kahaner, and then you just go over and over them. We really get it, you know, about the second or third time around, even if we do not the first. We do not need to have it six or eight.

Q. Just repeating what I said before, that the approval of your Department does not carry it, your approval that they can sell in any state?

A. The approval means for our Department that that product is eligible to move in commerce out of that plant.

Q. Just for your Department?

A. For the Department of Agriculture, that's right.

Mr. Kahaner: That is all.

[fol. 218] Judge Friendly: I would like to ask a question.

When the Armour and Swift applications for approval of the separate showing of the stuffing was submitted, the weight of the stuffing was submitted, just who in the Department participated in the determination to disapprove those?

The Witness: First of all, the food product section and our poultry inspection branch; they were discussed with the director's office, the director of the poultry division; with me and with my superior. I believe we touched based with our general counsel's office, the attorney that—

Judge Friendly: General counsel for the Department?

The Witness: That is correct, sir. The attorney that generally handles our work in so far as poultry inspection matters are concerned and, as a matter of fact, the letter was of—that was sent out disapproving the label, was cleared with that office.

Judge Friendly: It did not go to the assistant secretary or anything of that level?

The Witness: No, sir.

Judge Friendly: Another question I would like to ask [fol. 219] you is this: You talked about the possibilities of confusion, the weight of one bird would get mixed up with the weight of another bird. Why couldn't a tag or something be stuck on the bird at the time it was weighed before the stuffing, remain with the bird until the final weighing?

The Witness: If it were securely affixed, there is a possibility for that, but it was pointed out here the other day that probably two or three ways, depending on whether or not the giblets are included, and there are calculations involved—some are along the lines to arrive at these different weights. Our check in this matter is based on intermittent spot checks, and we have to check on the finished product; and, at that point, after it is frozen, you cannot accurately construct the weights of the stuffing and the weight of the bird, because of the leaking out of fluids when the bird is defrosted, going into the stuffing, the fluids from the bird, they lose moisture and the fluid on defrosting.

Judge Friendly: On defrosting?

The Witness: Yes. We have to defrost a frozen stuffed bird. We'd have to defrost, remove the stuffing, weigh the total—

[fol. 220] Judge Friendly: You would have to make a test after the event?

The Witness: After the event. And these birds go right from the processing—from the scale, actually, in a matter of a second right into the shrink tank and into this liquid freeze device, and the products are frozen.

Judge Friendly: Is that the way you verify the manufacturer's weights, by defrosting the bird and then—

The Witness: That would be the only way we would have with the staffing that we have in plants. We do check weight during the operation, spot check birds throughout the day to see that the formula, the percentages of stuffing, are in compliance with the formula.

There we get the bird at the end of the line, before it's—or just after it's weighed, before it goes into the freezer operation.

Judge Friendly: That is what I do not quite understand. If the bird is weighed before being stuffed and you make some spot checks to see that those scales are in good order and that the manufacturer is accurately recording the data, then you could do the same thing again just before the bird [fol. 221] is put into the freezer, couldn't you?

The Witness: Well, that's true. We can do that and we do a sufficient amount of that to check with the—into the operations in compliance with the formulation. But we do not check sufficient birds to really assure ourselves that the net weights for all the statements would be correct, because we'd have to have a man in there pretty much all the time, and we don't have that kind of staffing available for these further processed combination foods.

Judge Friendly: How many birds do you defrost, what proportion of the birds do you defrost in order to test?

The Witness: We don't defrost any. We weigh the birds in a frozen form to check the total net weight of the product deducting the tare, of course.

Judge Friendly: I see.

Mr. Kahaner: May I have one more question, please?

By Mr. Kahaner:

Q. In view of the President's concern and Congressional concern about the packaging and all that, could you say [fol. 222] that maybe within a period of a month or two months your Department might change its mind?

A. I'm not in a position to say what the Department will do on that.

Q. Well, it has been ambivalent previously. In some places it gave permission, others it withdrew it, so that there is no fixed standard at the moment or maybe at this moment there is, but three months ago it was different, or six months ago, where they gave tentative approval.

Now, couldn't the same thing happen three months or six months from today, that somebody in your Department could decide the two weights should be included and increase the personnel to provide the extra help that would be necessary?

A. Somebody could decide that, yes, sir.

Mr. Kahaner: That is all.

Judge Friendly: Any redirect?

Mr. Condon: Yes, sir.

May I have this marked for identification, please.

(Plaintiff's Exhibit 9 marked for identification.)

Redirect examination.

By Mr. Condon:

Q. I show you Plaintiffs' Exhibit 9 for identification, Mr. [fol. 223] Hauver, and ask if you can tell me what it is (handing).

A. This is a letter from Dr. de Holl of the United States Department of Agriculture, Meat Inspection Division, who is chief staff officer in charge of labels and standards, addressed to Mr. Vastola of Canada Packers, Inc., in which he points out that—

Judge Friendly: I do not think we need describe the letter. The question is if you have identified it, that is all. Thank you.

OFFER IN EVIDENCE

Mr. Condon: I will offer it in evidence.

Judge Friendly: Received.

(Plaintiffs' Exhibit 9 for identification received in evidence.)

Judge Friendly: Do you want to use that?

Mr. Condon: No, I do not. Thank you.

Q. Mr. Hauver, how many products do you think there are under your jurisdiction at the present time which involves the combination of poultry with some other foods?

A. Well, there are well over a hundred, I would think.

Q. Do they all require labels showing one net weight?

Mr. Kahaner: I object to anything but what is under [fol. 224] consideration in this case.

Judge Friendly: Oh, I do not know. It seems to me we have had garnished hams, we can have other kinds of poultry. Perhaps you can get the witness to describe them a little bit.

Mr. Condon: I will be glad to.

Q. Will you tell us about some of them, Mr. Hauver.

A. Well, we have different kinds of dinners: chicken dinners and turkey dinners; and dishes: chicken and noodles and chicken chow mein, chicken noodle soups, for instance, and a variety of those convenient items, chicken tamales, and there are a few of them and, of course, we have turkey in the same area.

Q. When you approve labels for those products, do you require they show one net weight of the total combination?

A. Yes, we do.

Q. You do not allow a showing of the separate weight of the poultry component in those products?

A. No.

Q. Would it be difficult to work out the separate weight of the poultry components; is that more difficult than in stuffed turkeys, for example?

Mr. Kahaner: I object, your Honor.

[fol. 225] Judge Friendly: Overruled. You may answer.

A. Yes, it would be more difficult, as I mentioned earlier. When you get into these combination foods, it's practically impossible to reconstruct the net weights of the various ingredients. That's why we have in-plant inspection, to check on formulations and see that the products do meet the requirements.

Q. Do any problems, created by the labeling of those products, have any bearing in consideration with respect to the development of the policy on the stuffed turkeys?

Mr. Kahaner: I object, your Honor.

Judge Friendly: Overruled.

A. Yes. It certainly does. It was pointed out here that we thought that we could on this Rock Cornish deal, where it was a hand operation, where we could authorize the separate showing of weights and stuffing. When you get into products that are prepared, such as these combination foods that I just mentioned, there is no real way that you can accurately know the content of the meat versus the peas, versus the rice or gravy or what-have-you. You have to look at this product as it's prepared, and we check weight, the amount of meat, the amount of this, that and the other [fol. 226] that goes into the batch, and then it is filled into these containers. So that actually, anything that you would put on a label would be a rough estimate.

Judge Friendly: Do you have tolerances that are permitted, for example, of chicken mein? Must it have X per cent of chicken in it all within a range?

The Witness: We have minimum meat standards, that it must meet the minimum. Like in TV Dinners, the minimum—not the TV Dinners, but the chicken pies, it's 14 per cent cooked meat, based on the weight of the total product—an ounce, an eighth of meat in an 8-ounce pie—and that is, we check the amount of meat used and divide into the number of pies produced and establish reasonable, substantial compliance with our process.

Judge Croake: Do you have any knowledge of whether or not those packages so labeled are sold in the State of New York?

The Witness: I have not been in a retail store in New York City, sir.

Judge Croake: You have no knowledge?

The Witness: I have no knowledge.

Q. In this connection, Mr. Hauver, am I correct that the Department wanted to have a uniform policy with respect [fol. 227] to combination poultry products?

A. That's right, because it would seem to me to create some very difficult problems of moving products in various sections of the country if you have different requirements in one state or city than you do in others, and I think one of the reasons in back of this law is to promote the orderly flow of products.

Mr. Condon: That is all. Thank you.

Judge Friendly: Any further cross?

Recross examination.

By Mr. Kahaner:

Q. Mr. Hauver, you are discussing the preparation of prepared meat dinners. These are precooked, they are cooked and everything; is that it, and they have the separate items added, peas—

A. Well, some of them are. Some of them are frozen, ready-to-cook, you see.

Q. You see, but they have a combination of ingredients?

A. That is correct.

Q. So that you would have to weigh the peas, you would have to weigh the rice or the gravy, everything, that is what would make it difficult for your Department to enforce; is that it?

A. That's right.

[fol. 228] Q. Is that the reason, because of these varied mixtures, some of these things could have ten different items added?

A. That's right.

Q. But we are talking about stuffed turkeys, where there is just one item, just the stuffing of the item. There is no comparison with an item like stuffed turkey and these meat dinners or anything else that contains five to ten different ingredients?

A. Well—

Q. Would you say the comparison is similar?

A. In some products the comparison is similar. For instance—

Q. I am talking about stuffed turkeys.

A. All right. Stuffed turkeys and breaded chicken, ready for frying. We have products like that packed, and are sold in retail stores, and it seems to me it might be a similar situation where you had breaded drumsticks or breaded chicken breasts and stuffed turkey, it would be a practical imposibility to accurately state on the package the percentage of all the weight of the breading, and the weight of the—

Q. When you say it is impossible, some means can be found to make it possible?

[fol. 229] A. Under today's processing conditions, they are not available right now in use.

Q. But if it was necessary to protect the consumer, wouldn't means be found to do it?

A. If it was necessary to protect the consumer—

Q. That is all.

Mr. Condon: Finish your answer.

A. —perhaps means would be found, because necessity is pretty important there.

Mr. Kahaner: That is all.

Judge Croake: If the Federal regulation was the same as the State, could the means be found to do it?

The Witness: We would have—we would—first of all—

Judge Croake: Can you answer?

The Witness: Yes, sir, I can answer that.

Judge Croake: What is the answer?

The Witness: If the Federal regulation was the same as the State, we would have found a way to check it out to our satisfaction, because we are interested in truthful labeling and the process would have to lend itself in order to reasonably verify the accuracy of the statement.

Judge Croake: Thank you.

[fol. 230] Judge Friendly: Thank you. You are excused.

(Witness excused.)

Judge Friendly: Next witness.

Mr. Condon: Mr. Sniegocki.

Francis Sniegocki, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Condon:

Q. Mr. Sniegocki, by whom are you employed, sir?

A. Armour & Company.

Q. Where?

A. At Newburgh, New York.

Q. What is your job there?

A. I am the manager of the sales unit at Newburgh, New York.

Q. What is a sales unit, just roughly?

A. Branch house.

Q. Well, what is the function of a sales unit?

A. We offer for sale Armour products to the retail trade and consumer to, oh, food service outlets and wherever food is sold at wholesale levels.

Q. Do you do any processing up there?

A. None whatsoever.

Q. How long have you been manager up there?

[fol. 231] A. At Newburgh a little short of six years, sir.

Q. How long have you been with Armour & Company altogether?

A. A little over 19 years, sir.

Q. In the course of your experience as the manager at the Newburgh sales unit of Armour, have you handled stuffed turkeys, Armour stuffed turkeys?

A. Yes, sir.

Q. You have sold them up there?

A. Yes, sir.

Q. Do you sell them now?

A. No, sir.

Q. How long have you not been selling them?

A. Since 1962.

Q. Can you narrow it down to any part of 1962?

A. The fall, I would say, of 1962; perhaps late September, October, in that neighborhood.

Q. Where did you stop selling them?

A. Prior to Thanksgiving season, the sales season, which is the heavy turkey selling season, Mr. Wensing, who is the Sealer of Weights and Measures in the City of Newburgh, came to my office and informed me that the sale of stuffed turkeys in the State of New York was illegal unless certain conditions could be met. Amongst those conditions [fol. 232] were that the weight of the dressing would have to be shown separately from the weight of the bird. And inasmuch as our turkeys showed only the gross weight, we were obliged to stop selling them.

Q. You say the gross weight?

A. Which is the combined weight of the turkey and the dressing.

Q. It does not include the weight of the packaging, does it?

A. No, the turkey and the dressing.

Q. It is the net weight of the total combination?

A. It is the net weight of the bird.

Judge Wyatt: Tell me, what is a Sealer?

The Witness: A City Sealer of Weights and Measures? He's the gentleman who comes into places such as our own, retail places, and inspects our scales for accuracy.

Judge Wyatt: He is a city official?

The Witness: That is correct, sir.

Q. Mr. Wensing, did he come alone when he talked to you about stuffed turkeys, sir?

A. Yes, he did.

Q. He did not come and talk to you at any time in company with somebody else? [fol. 233]

A. No, sir.

Q. No. And you have not sold any stuffed turkeys since that visit of his in 1962?

A. I have not, sir.

Q. Did you have stuffed turkeys in the house at that time?

A. No, sir.

Q. You did not?

A. No.

Mr. Condon: I have no further questions.

Judge Friendly: Cross-examination?

Cross examination.

By Mr. Kahaner:

Q. You have never received any letter or directive from the defendant in this case, have you?

A. In writing, sir, no.

Q. Has any State inspector ever told you that you could not—

A. No, sir.

Q. —sell these stuffed turkeys?

A. No, sir.

Q. So the only thing that made you stop selling the turkeys is a local Sealer of Weights and Measures advised you, told you not to sell it?

[fol. 234] A. That is correct, sir.

Mr. Kahaner: That is all.

Judge Friendly: Thank you. Next witness.

(Witness excused.)

Mr. Condon: Mr. Geiger, please.

Kenneth K. Geiger, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Condon:

Q. Mr. Geiger, by whom are you employed?

A. By Armour & Company.

Q. And where?

A. I am manager of the branch at Poughkeepsie, New York.

Q. How long have you been in that position?

A. In Poughkeepsie about five years.

Q. How longn have you been with Armour & Company altogether?

A. Approximately 21 years.

Q. Mr. Geiger, in your experience as the manager of the Poughkeepsie sales unit of Armour & Company, have you ever handled stuffed turkeys?

A. Yes, I have.

Q. Do you sell them now?

[fol. 235] A. No, sir.

Q. When did you stop selling stuffed turkeys?

A. I believe late in October of 1963.

Q. 1963?

A. Yes, sir.

Q. Can you tell me why you stopped seling stuffed turkeys?

A. Well, we were originating a featured sale on stuffed poultry with a chain store whose headquarters were in Boston, and the sale was being originated in Boston. And the store manager was told by a Dutchess County sealer—

Mr. Kahaner: I object to this hearsay testimony.

Judge Friendly: I am not very clear. Is this a conversation that you heard or just retold to you?

The Witness: Your Honor, I am trying to tell this gentleman how I happened to be stopped from selling stuffed turkeys.

Judge Friendly: Yes, but what we want to know is whether you were present at this conversation between the man in Dutchess County and the official.

The Witness: No, sir. I was asked by the store manager to determine if what he had been told was correct and proper.

[fol. 236] Judge Friendly: I do not see how this can come in, Mr. Condon.

Mr. Condon: This is background for what I am going to bring out, sir. I did not know where he was going with that particular story.

Judge Friendly: I will sustain it. Try it again.

Q. Mr. Geiger, let me ask you this: Did you, in the fall of 1963, make any inquiry of any official with respect to the sale of stuffed poultry?

A. Yes, I did.

Mr. Kahaner: I object to that, your Honor. It should be more specific what type of—

Judge Friendly: We will get down to it.

A. (Continuing) Yes, I did.

Q. And of whom did you make the inquiry, sir?

A. Of Mr. Dean.

Q. What is his position?

A. He is the Sealer for Dutchess County, New York.

Q. What were you advised by Mr. Dean?

A. I was advised that I would not be—

Mr. Kahaner: I object, your Honor, on the ground that anything by this local Sealer, what he said, is not binding [fol. 237] on the defendant.

Judge Friendly: Overruled.

You may answer.

A. I was advised that I could not sell or offer for sale stuffed poultry in Dutchess County. Then a few days later a Mr. Pinello, who is an employee of Mr. Dean, as a sealer, came to my office and again restated officially that I could not offer for sale stuffed poultry in Dutchess County.

Q. Under any circumstances?
A. Under any circumstances.

Judge Wyatt: You mean regardles of what kind of label it had on it?
The Witness: There was no discussion at the time as to what label should be on it or should not be on it. He simply said that I could not sell stuffed poultry in Dutchess County.

Q. Is it your testimony you have not sold any stuffed poultry in Poughkeepsie since that time?
A. No, sir, I have not; no, sir.

Mr. Condon: That is all. No further questions.
Mr. Kahaner: At this time I would like to strike out the testimony of this witness as not proving anything.
[fol. 238] Judge Friendly: Well, we will leave it in, Mr. Kahaner. I confess I do not think it proves very much.
Mr. Kahaner: He testified that he was not given any reason—
Judge Friendly: We understand. He said he was going to stop selling and there was no reason given, so I do not think you lost anything.
Judge Croake: It is not dispositive of the issue here, anyway. We have heard it.
Judge Friendly: I do not think there is anything to worry about.

Cross examination.

By Mr. Kahaner:

Q. Up to 1963, Mr. Geiger, you were selling stuffed turkeys; is that right?
A. Yes, sir.
Q. Nobody from the State, the defendant here, the Commissioner of Agriculture, ever notified you to stop selling turkeys?
A. No, sir.

Q. Nobody from his department, his inspectors, came into your place and told you to stop selling turkeys?

A. No, sir.

Mr. Kahaner: That is all.

[fol. 239] Judge Friendly: Thank you, Mr. Geiger. You are excused.

(Witness excused.)

Mr. Condon: Mr. Simonetti.

Charles B. Simonetti, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Condon:

Q. Mr. Simonetti, by whom are you employed?

A. Swift & Company, Corporation.

Q. Where?

A. Newburgh, New York.

Q. What is your position with Swift & Company?

A. Manager of the sale unit at Newburgh.

Q. How long have you had that position?

A. Three years.

Q. How long have you been with Swift & Company?

A. 18 years.

Q. Now, in your position as manager of the Newburgh sales unit of Swift & Company, have you sold Swift's stuffed turkeys?

A. Well, we were about to introduce them into our territory and we were told to stop selling them.

Q. When were you told to stop selling them?

[fol. 240] A. Just prior to the holiday season in 1962.

Q. Who told you?

A. Mr. Wensing, the Department of Weights and Measures.

Judge Wyatt: What holiday season are you talking about?

The Witness: Christmas.

Judge Wyatt: Is it Christmas or Thanksgiving?

The Witness: Thanksgiving.

Judge Wyatt: Just before Thanksgiving of 1962.

Q. What did Mr. Wensing tell you?

A. He told us that it was against the law to sell them and—in their present state, and if we could show the weight of the stuffing of the turkey separate, that we could sell it; and, of course, we couldn't do that.

Q. Was Mr. Wensing with you, I mean, was he alone when he came to see you?

A. Yes, sir.

Q. He did not come to see you in company with anybody else?

A. Yes, he came back about two days later and he had two other men with him.

Q. Do you know who they were?

A. I think one was Mr. Van Zetta, the County Sealer, [fol. 241] and I do not know who the other man was.

Q. The County Sealer of what county, sir?

A. Orange County.

Q. Have you sold stuffed turkey since that time?

A. No, sir.

Mr. Condon: That is all.

Judge Friendly: Who is Mr. Wensing?

The Witness: The Sealer of Newburgh.

Judge Friendly: Cross-examination?

Cross examination.

By Mr. Kahaner:

Q. In other words, there is a separate Sealer for Newburgh and a separate Sealer for the County of Orange; is that it?

A. I'm not sure, sir. I believe he works out of the County Sealer's office. I'm not sure of the setup.

Q. Did you have any turkeys on hand to sell?

A. Yes, sir.

Q. Had you tried to sell it?

A. Well, we had placed some out in stores; we picked them out and brought them back to the sale unit and removed them to another state.

Q. Prior to Thanksgiving of '62, you did not even attempt to sell the stuffed turkeys; is that it?

[fol. 242] A. No, sir.

Q. They were not an item or there was not any demand for them?

A. Well, I had never been acquainted with the item before I came to Newburgh. I worked in an altogether different area of the business. And I was about to introduce them into the territory.

Q. You had never heard anything official from the defendant, Mr. Wickham, in this case, of the Department of Agriculture, not to sell stuffed turkeys?

A. No, sir.

Q. Or to require separate weights?

A. No, sir.

Q. Did anybody in his department ever come in to you and identify himself as a member of his staff and tell you not to sell the turkeys in the condition they were?

A. No, sir.

Q. You never heard from anybody in the State Department of Agriculture in this State?

A. No one other than Mr. Wensing.

Q. And he is the local Sealer?

A. Yes, sir.

Mr. Kahaner: Thank you. That is all.

[fol. 243] Judge Wyatt: Mr. Kanaher, is it one of your defenses that the Commissioner is not enforcing this regulation?

Mr. Kahaner: Well, I have set forth that the Commissioner has not personally done anything, that up to the present time either he or his staff, and my brief showed that.

Judge Friendly: It does seem as if we are having a certain amount of shadowboxing here, because one of your points is that the State of New York is doing a far, far better thing for consumers than the Department of Agriculture, and your other point is the State of New York is not doing anything.

I suppose it is perfectly all right for a defendant to take alternate positions, but it is a little confusing.

Mr. Kahaner: This happens to be the fact. The only thing, there is a law on the books.

Judge Friendly: The law, as I see it—

Mr. Kahaner: The regulation is 221.40, which deals with retail sales.

Judge Friendly: That could mean either it could be satisfied by the label, it could be deemed to be satisfied by the label that Swift and Armour used, or it could be deemed [fol. 244] the other way. That is a matter of interpretation, isn't it?

Mr. Kahaner: Yes. The only thing is that I believe the plaintiffs will show some affirmative act on the part of the defendant. I assume they have something.

Judge Friendly: Let us wait and see.

Mr. Kahaner: That is why I am just bringing this up now, to show that all these transactions took place without even the defendant knowing anything about it.

Judge Friendly: We hope that plaintiffs will put in such proof, if any exists, so that we do not have to worry about this particular issue, but let us see what happens.

Anything else of this witness?

Mr. Condon: I have nothing further.

Judge Friendly: You are excused, Mr. Simonetti.

(Witness excused.)

Mr. Condon: Mr. McKnight.

[fol. 245] **William R. McKnight**, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Condon:

Q. Mr. McKnight, by whom are you employed, sir?

A. I work for the Great Atlantic & Pacific Tea Company.

Q. What is your position?

A. I am assistant to the director of meat operations for the eastern division.

Q. What is your responsibility in that position?

A. We cover general overall supervision of all meat activities within this metropolitan area, which includes North Jersey, the five boroughs, Westchester, Rockland and Orange Counties, having to do with procurement, sales, establishment of prices, advertising, general policy as concerns store operation.

Q. Anything to do with the meat operations of your stores within your territory; is that right?

A. That's right.

Q. Mr. McKnight, how long have you been in this position, by the way?

A. Well, about 30 years.

Q. 30 years.

[fol. 246] In the course of that time, did departments of the A & P handle stuffed turkeys?

A. We have, during recent years—it's an article that came on the market within the last few years.

Q. Do you still handle stuffed turkeys?

A. We still handle stuffed turkeys in our stores in New Jersey.

Q. Do you handle them in your stores in New York?

A. Not at the present time. We did at one time.

Q. When did you stop handling them in your stores in New York?

A. We took them out of our stores in New York City in May of 1962, and then some time later during that year —I cannot tell you the exact time—sometime prior to the Thanksgiving holidays, we discontinued handling them in all stores within New York State.

Q. Why did you discontinue handling them?

A. Originally, the first comment we had, a man reported as being a New York State inspector—I think his name was Osinger, something of that kind—in one of our stores on Long Island, told us that we may not handle stuffed turkeys unless they were cooked on the premises. That we could find no grounds for that, so we continued to handle them.

[fol. 247] Mr. Kahaner: I did not get that. I do not know the relevance of that. Was that some other reason?

Judge Friendly: I take it this is just background information.

Mr. Kahaner: I am having a little trouble hearing the witness.

A. (Continuing) Some time later in Suffolk County, another inspector, it may have been the same one, told our store personnel in our Riverhead store remove turkeys, stuffed turkeys, from sale; they may not be handled in the stores unless the weight of the stuffing was shown separately.

At some later date, the newspapers carried a story whereby in New York City some butcher was summoned for violating the law, which was stated as prohibiting the sale of turkeys, stuffed turkeys, unless the weight of the stuffing and turkey were shown separately.

Following that, we withdrew the sale of turkeys in our stores in New York City.

At some later date, and it was alleged that this was done on the basis of a State law, and if—

Mr. Kahaner: I object to this testimony as to what is alleged and what he heard.

Judge Friendly: I think you better be a little—strike [fol. 248] out the entire sentence. Tell us just who said what to whom about this State law.

The Witness: That, sir, I believe, was carried in the newspaper stories.

Judge Friendly: This was not anything that was said to you, it was some newspaper story?

The Witness: Yes, that's right.

Judge Friendly: I do not see any value in the witness' testimony about that, Mr. Condon.

Q. I understand your stores were told in Suffolk County about the product?

A. That's right.

Q. Were your stores told by inspectors anywhere else that they could not handle the product?

A. I believe in Rockland County. I can't remember the dates.

Mr. Kahaner: Will he identify the inspectors? I do not know whether there was State or local inspectors or just what it is, and I would like to object on the grounds where he does not identify the inspector as being a State inspector.

Judge Friendly: You state the facts to the best of your knowledge, Mr. McKnight, as to what they were, as to who the inspectors were.

[fol. 249] A. (Continuing) In Rockland County, their inspector—and I can't name names—did in our stores tell us that turkeys, stuffed turkeys, could not legally be sold.

Judge Friendly: Do you know whether they were City officials or County officials or State officials?

The Witness: No, your Honor, I don't.

Judge Friendly: You know some official told you that the stuffed turkeys could not be sold?

The Witness: Yes, sir.

Mr. Kahaner: I move to strike the answer out.

Judge Friendly: We will let it stand.

Q. Any place else, sir?

A. No other, to my recollection.

Q. Were you ever told by officials of the City of New York not to sell the product?

A. No, we were not.

Mr. Condon: Thank you.
Judge Friendly: Mr. Kahaner?

Cross examination.

By Mr. Kahaner:

Q. Mr. McKnight, you said you heard about a criminal action that was instituted in the City of New York against a retail dealer as a result of selling stuffed turkeys?

A. We read about that in the papers.

[fol. 250] Q. And that resulted in a conviction; do you remember the facts about that?

A. I believe it did.

Q. Against a retail dealer and Swift & Company; is that right?

A. I'm not sure that Swift was included in that. I do remember the retail dealer was convicted.

Q. As a result of that new story, you stopped selling the stuffed turkeys in New York City?

A. In New York City, yes, sir.

Q. That is the only reason?

A. Yes.

Q. You never heard anything from Mr. Wickham, either orally or in writing, not to sell stuffed turkeys because of the weights, they were not properly stated?

A. No.

Q. Did any inspector from his office ever come to you and tell you that you should not sell stuffed turkeys?

A. No, sir.

Q. You mentioned something in the beginning of your testimony of somebody, a State inspector?

A. Yes, the first we heard of any controversy on stuffed turkeys, a State inspector in one of our stores on Long [fol. 251] Island—

Q. One minute. Were you there?

A. No.

Q. Do you know of your own knowledge that this was a State inspector in Long Island?

A. It was reported by our people in our Garden City office.

Q. This is something that was told to you?

A. That's right.

Q. You are not sure who the man was; is that it, personally, of your own knowledge?

A. I have the name of the man that was passed on to me. His name was Walter Osinger.

Judge Friendly: What?

The Witness: O-s-i-n-g-e-r. It was reported that he was a State inspector.

Q. Suppose I were to tell you that there is no such person in the State inspection office of the Agricultural Department, would that change your mind?

A. Not necessarily.

Q. You mean this is something that somebody told you?

A. That's right, just as it would be something that you're telling me.

A. Thatt's right, just as it would be something that you're telling me.

[fol. 252] Q. I see. How many years prior to 1962 were you selling the stuffed turkeys?

A. I can't tell you exactly. Probably three to four years.

Q. Do you have stores in other parts of the State?

A. We do have.

Q. Buffalo, all through there?

A. We do have.

Q. Do you know whether they are selling stuffed turkeys?

A. No, I don't. Our office administers only what we call our esatern division, which covers the metropolitan area.

Q. So if I were to tell you that some of your stores are selling stuffed turkey in other counties in New York State, you would not know whether that is so or not?

A. No, I would not.

Q. You have no information that they are not?

A. No, I haven't.

Q. And all you know is that in New York City you discontinued selling stuffed turkeys?

A. And subsequently in all of our other stores in New York State within this division.

[fol. 253] Q. As a result of what some local man told you; is that right?

A. No, because the New York City case against this butcher was based on State law, and inasmuch as our stores are in New York State, out of New York City, if it's a State law, it would apply to those stores as well.

Q. Did you get this information from your legal counsel?

A. We did consult with our legal counsel on that.

Q. Did you personally consult?

A. Yes.

Q. Did they give you this in writing?

A. Not as a legal opinion, no. This was a decision based upon our own judgment as to what would be the best means to follow.

Q. But actually, no summons has ever been served on you by any State agency or the Department of Agriculture?

A. No.

Q. Specifically?

A. No.

Q. You never saw a State inspector in any of the stores, did you, from the Department of Agriculture?

A. I, personally?

Q. Yes.

[fol. 254] A. No.

Mr. Kahaner: That is all.

Judge Friendly: Any redirect?

Mr. Condon: No more.

Judge Friendly: You are excused. Thank you.

(Witness excused.)

Joseph Rufino, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Condon:

Q. Mr. Rufino, by whom are you employed, sir?
A. Grand Union Company.
Q. What is your position with Grand Union?
A. Meats sales manager for the Sunrise Division.
Q. What does the Sunrise Division encompass?
A. That's stores we have on Long Island. They go from Nassau, Queens and Suffolk County. There's 57 stores.
Q. What is your responsibility?
A. I'm in charge of the overall meat operation and responsible for the whole meat operation.
Q. Anything to do—
A. Anything pertaining to meat.
Q. Tell me, Mr. Rufino, how long have you had this job?
[fol. 255] A. About two and a half—just approximately two and a half years.
Q. How long have you been with Grand Union?
A. 16 years.
Q. In your experience in the Sunrise Division, sir, did your stores out there carry stuffed turkeys?
A. Yes, they did.
Q. Do you sell stuffed turkeys now in your stores?
A. No, we do not.
Q. When did you discontinue the sale of stuffed turkeys?
A. About November, right before Thanksgiving in 1962.
Q. Can you tell me why you stopped selling them?
A. Yes, we had occasions for Weights and Measures inspectors to stop into our stores and advise the manager that we could not sell stuffed poultry of any kind unless we specified the weight of the stuffing.
Q. Do you know whos those inspectors were?
A. No, I don't.
Q. Do you know what authority they had; do you know whether they were County or State or local?

A. I think it would be County, if I'm not mistaken, out [fol. 256] there.

Q. You said inspectors came into your stores and told them. Where, specifically, what counties?

A. Suffolk County and Nassau County. We got called—I got a call at the office at a few different intervals, and I turned it in to our main office in Paterson; that what they told us was to take them off sale, not to offer them for sale.

Q. So you did not make the decision yourself?

A. No, I didn't. It came from East Paterson, the main office.

Q. Of the Grand Union Company, the main office?

A. That's right.

Q. Did you have stuffed turkeys in your stores at that time?

A. Yes, we did.

Q. What did you do witht hem?

A. We had them picked up and shipped back to the warehouse. We have a warehouse up in Mt. Kisco, New York. All our merchandise comes into the stores, and it was just picked up by trucks and shipped back.

Q. You do not now carry stuffed turkeys in your division at all?

A. No, we don't. We don't have any stuffed turkeys at all.

[fol. 257] Mr. Condon: I have no further questions.

Judge Friendly: Mr. Kahaner.

Cross examination.

By Mr. Kahaner:

Q. Mr. Rufino, all you are telling us is that these stuffed turkeys were for sale in retail establishments; is that it?

A. Yes.

Q. You sell in the stores directly to the retailer?

A. Yes, sir.

Q. You say you received some information from some local sealer that you had to have the stuff separately stated?

A. That's right, sir.

Judge Wyatt: Mr. Kahaner, did I understand you to say that he sells to the retailer?

Mr. Kahaner: Yes, Grand Union.

Judge Wyatt: I thought he sold to the public.

Mr. Kahaner: I am sorry, to the public.

Judge Wyatt: You are not wholesalers selling to the retailer?

Mr. Kahaner: He sells at retail to the public.

Judge Wyatt: Yes.

Q. So that this local sealer was from the County or the [fol. 258] village or some particular local area?

A. Yes, sir.

Q. Did he speak to you personally?

A. No, sir.

Q. Are you are telling us now is what some of your managers in those stores told you?

A. Yes, sir.

Judge Croake: And what he did as a result of it?

The Witness: What I did when I got the information.

Q. Yes. But they specifically said that these were local sealers from the particular town or county?

A. Well, I assume they are, because them are the ones that come in our stores out there.

Q. Did your office ever get anything in writing officially—

A. No.

Q. —from the defendant?

Did the Department of Agriculture of the State of New York say anything that you just told us that the stuffed turkeys should be separately stated as to weight and stuffing?

A. Not to my knowledge, no.

[fol. 259] Q. And up to the present time, you have received nothing?

A. No, sir.

Q. So this was only an act on your part because of what some local sealers told you?

A. Yes, sir. Well, that was the company's part, I would say.

Q. But that was based on what you just said, that these local sealers said that they wanted the stuffing separately stated?

A. Yes.

Mr. Kahaner: That is all.

Judge Friendly: Thank you.

Mr. Condon: That is all, sir.

(Witness excused.)

Judge Friendly: Any further witnesses?

John M. Kerbs, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Condon:

Q. Mr. Kerbs, by whom are you employed?

A. County of Suffolk.

Q. What is your position out there, sir?

[fol. 260] A. County Sealer.

Q. Can you tell us what is a County Sealer?

A. I can to into great length. A County Sealer is appointed by the Board of Supervisors of the County to enforce the laws, rules and regulations of the State of New York, Department of Agriculture and Markets.

Q. With respect to what, anything or just weights and measures?

A. I'm sorry. Certainly related to weights and measures.

Q. How long have you been the County Sealer, Mr. Kerbs?

A. I'm the County Sealer for roughly a year and a half.

Q. A year and a half?

A. That's right.

Q. How long have you been in the Department out there?

A. Over 17 years.

Q. In the course of that time, Mr. Kerbs, have you had occasion to take any action, whether it be direct enforcement or discussion with merchants, of any kind with respect to stuffed turkeys?

A. Yes.

[fol. 261] Q. What action have you taken?

A. Taken them off sale.

Q. Would you tell us when you did that?

A. In the early part of 1962.

Q. Did you do that in one store or several stores?

A. Certainly more than one. I wouldn't venture to say how many.

Q. Was your activity in that regard pretty well spread over Suffolk County?

A. At that particular time, as I have indicated, I was not County Sealer, I was an inspector. I personally ordered them off sale, and I would presume that some of the other men did, too. This I have no definite knowledge of.

Q. Do I understand when you were an inspector and not the County Sealer, you had a definite portion of the County you were responsible for; is that what you mean?

A. I did.

Q. In this area in which you were responsible, you did order them off sale. Why did you do that, sir?

A. Upon orders of the previous County Sealer.

Q. When you ordered them off sale, did you tell the holders of the product why you were ordering them off [fol. 262] sale?

A. Right at this moment, I could not state yes or no whether I did or not.

Q. Now, since you became County Sealer, have you had any experience with stuffed turkeys?

A. I haven't had any definite experience. It hasn't crossed my mind to any degree until this—I was aware of this action.

Q. I understood you to say, Mr. Kerbs, that you enforce the Agriculture and Markets law and the regulations thereunder with respect to weights and measures; is that right?

A. That's correct.

Q. To whom do you look, sir, for your instructions with respect to the law and the regulations?

A. I would say this: that if there is any doubt as to—in my own mind as to my interpretation of a given law, I would write to the State Director, Mr. Madden.

Q. Does he issue a ruling in response to your letter?

A. This is the normal procedure.

Q. Are you bound by his ruling?

A. As far as I'm concerned, I am.

[fol. 263] Q. Did you have occasion to write to the State Director about stuffed turkeys at any time?

A. I did.

Q. When did you do that, sir?

A. May I?

Q. Surely.

A. I'd say it's about two weeks ago.

Q. Did you get a response?

A. Pardon?

Q. Did you get a response?

A. I did. I wrote the letter on February 10th. I received a reply. His letter is dated February 15, 1964.

Q. May I see them, please, sir?

(Witness hands.)

OFFERS IN EVIDENCE

Mr. Condon: I would like to offer these in evidence, if I may.

Judge Friendly: Show them to Mr. Kahaner.

(Mr. Condon hands.)

Mr. Kahaner: All right.

Judge Friendly: No objection?

Mr. Kahaner: No, sir.

Judge Friendly: Received.

(Plaintiffs' Exhibit 10 received in evidence.)

[fol. 264] Judge Wyatt: What is it, Mr. Clerk? Is it one letter or two letters?

The Clerk: Two letters.

Mr. Condon: An exchange of correspondence, your Honor.

Judge Wyatt: Two letters.

Q. The letters are in evidence, Mr. Kerbs, and they can speak for themselves. But, basically, Mr. Madden confirmed what you understood the law to be, did he?

A. Basically.

Q. So that do you permit the sale of stuffed poultry in Suffolk County now?

A. Right at this moment, I have told my men not to even see a stuffed piece of poultry until this litigation is—this case is resolved.

Q. You mean that they are not looking for them?

A. Absolutely.

Judge Wyatt: Who is the "they," Mr. Kerbs?

The Witness: The inspectors in the field, sir.

Judge Wyatt: They are not looking to see whether any stuffed turkeys are being sold or not?

The Witness: That's right, because I wanted to base my opinion in regards to instructing them upon the result of [fol. 265] this action.

Judge Wyatt: You mean they could be sold in Suffolk County today?

The Witness: That's true.

Judge Wyatt: Because you are not out looking to see whether they are following this instruction from the State Department of Agriculture or not?

The Witness: That is correct.

Judge Wyatt: I understand.

Judge Friendly: When you, as an inspector, in 1962 told the merchants to take stuffed turkeys off of sale, was it because you thought they were not wholesome or was it because of the labeling problem?

The Witness: Actually, sir, your Honor, our or my personal reason for it was because I had received, and every other inspector in the Department to my knowledge received, a letter from the County Sealer at that time to take them off sale and report to him the name and address of the packer and of the seller, and I would presume—maybe I shouldn't say what I presume.

Judge Friendly: What did he say, just take all stuffed turkeys off sale no matter how they are labeled?

The Witness: Yes, sir.

[fol. 266] Q. Do you happen to have, Mr. Kerbs, do you have that instruction that you received from your predecessor at that time?

A. Yes, sir.

Q. Do you have it with you?

A. Yes.

Q. May I see it?

A. (Handing.) This is not the one I received. This is a copy of the letter that was sent to the inspectors. I did not receive that personally.

Q. Weren't you one of the inspectors at that time?

A. Yes, sir.

Q. But you did not get a copy of it?

A. I did, but when I took over as County Sealer a year and a half ago, I cleaned out my office, which was the car, and that sort of thing went with it.

Q. What you are telling us here is this is exactly the same as what you received, it just happens to be physically different?

A. To my knowledge, it is.

Q. All right, fine.

A. In fact, this is one of them that was sent out to one of the other inspectors. That's a photostat of it.

Mr. Condon: I will offer this photostat in evidence, if I [fol. 267] may.

Mr. Kahaner: I do not think that this has any application to the present lawsuit. It says, "Watch for poultry with stuffing which is not cooked." I do not think it has any application. It is immaterial. It is not binding on the defendant. It is from a County Sealer.

Judge Friendly: It also says, "Our rules and regulations state, 'poultry' when roasted in advance of sale, the net weight shall include stuffing or dressing."

Whatever that means.

Mr. Kahaner: He does not refer to what rules and regulations. I do not think it is material to this lawsuit.

Judge Friendly: What is your theory about it, Mr. Condon?

Mr. Condon: I think it is all part of the tie-up. I can develop what regulations were involved in it. I am sure Mr. Kerbs can answer that question.

Judge Friendly: We will take it subject to your connecting it up. What number is this?

(Plaintiffs' Exhibit 11 received in evidence.)

Q. Mr. Kerbs, in Plaintiffs' Exhibit 11 here, Mr. Eberhard—

[fol. 268] A. Ehrhard.

Q. —Mr. Ehrhard said in this letter, "Our rules and regulations state," and he quotes. What rules and regulations is he talking about?

A. I presume the rules and regulations—

Mr. Kahaner: I object, your Honor.

Q. Do you know?

A. Do I know?

Q. Do you have rules and regulations of your own in Suffolk County with respect to rules and regulations?

A. We don't.

Q. When you are talking about the regulations and rules out there, what regulations?

A. The rules and regulations of the State—

Q. The Department of Agriculture and Markets?

A. That's right.

Q. All right, fine.

Mr. Kerbs, I think you told us a few moments ago that as of now you have told your inspectors not to bother with stuffed turkeys?

A. That's true.

Q. That is right.

Now, do I understand you right, and you correct me if I am wrong, do I understand that if it were not for this [fol. 269] litigation that you would prevent the sale of stuffed turkeys in Suffolk County based on the letter you received from Mr. Madden?

A. I would allow them to be sold under the conditions stated in the decision forwarded to me by Mr. Madden.

Q. In other words, if they were labeled in accordance with Mr. Madden's requirements you would permit the sale?

A. Absolutely.

Q. If they had just one net weight of the whole product, you would not?

A. That doesn't—his decision, I do not believe, said that.

Q. No, it said the opposite.

A. It said that it should—

Q. I am sorry. I am not fencing with you. Let us clear about this. If they were labeled as Mr. Madden says they should be, you would permit the sale?

A. Absolutely.

Q. If they are not labeled as Mr. Madden says they should be, you would not permit the sale?

A. That's correct.

Q. All right. And that is because of the ruling you received from Mr. Madden?

[fol. 270] A. Absolutely.

Q. Fine.

Mr. Condon: No further questions.

Judge Friendly: Mr. Kahaner?

Cross examination.

By Mr. Kahaner:

Q. Mr. Kerbs, are there stuffed turkeys around in Suffolk County in the retail stores at the present time?

A. To the best of my knowledge, there are not.

Q. Would you know if there were turkeys available for sale at retail in Suffolk County?

A. Would I be absolutely sure at this moment? No, sir.

Q. And you say that you will be governed by what Mr. Madden told you; is that it, in that letter?

A. That's correct.

Q. In the last paragraph of his letter, after quoting the Section 221.40 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York, he gives you his interpretation, is that it, of that section? In that section, it says, "Meat, poultry and fish," and it continues, "shall be sold or offered for sale as food for retail at net weight only"?

A. That's right.

[fol. 271] Q. And then he goes on to say, "In accordance with the rules and regulations, the sale of stuffed poultry is lawful, only if the net weight of the poultry, in addition to the net weight of the total combination product, is stated on the label."

You wrote this letter to Mr. Madden after you received an inquiry from counsel to Swift & Company, Mr. Colavito?

A. That's very true.

Q. When did he get interested in asking you about the stuffed poultry which is sold in Suffolk County?

Mr. Condon: I object to that. He could not know.

Q. Do you know when he spoke to you?

Judge Friendly: You may answer.

A. When—would you please repeat that?

Q. When did Mr. Colavito get in touch with you with reference to the sale of stuffed poultry in Suffolk County?

A. I believe it was that very day of my letter. Would that be the 15th of February?

Q. February 10, 1964. It's about a month ago or so?

A. The 10th.

[fol. 272] Q. Well, up to that time, prior to February 10, 1964, was stuffed turkey being sold in Suffolk County?

A. It might have been, but not to my knowledge.

Q. Did you prevent the sale of stuffed turkey prior to February 10, 1964, in Suffolk County?

A. I said it shouldn't be sold, correct.

Q. And you were basing that statement on your own interpretation?

A. I based it on the interpretation of the previous sealer and my own interpretation after I took over.

Q. That interpretation was that two weights had to be set forth; is that it, on the package of a stuffed turkey?

A. No, as far as I was concerned, it—stuffed poultry was not to be sold, period. This idea of the two weights was something that I received from Mr. Madden.

Q. In other words, the previous man in your job as a County Sealer had prohibited the sale of stuffed turkey no matter what was on the label, whether the weights were separately stated or not?

A. That's right.

Q. It had nothing to do with weights, as a matter of fact, all this time prior to 1964? The prohibition as to the sale of stuffed turkey had nothing to do with weights?

[fol. 273] A. It had to do with the—with the weight to the extent that it was his interpretation and it was my own that the net weight should have been of the meat itself, and if it had the dressing it was no longer, if it had one weight, it was no longer the net weight of the meat.

Q. Was that the reason for prohibiting the sale of stuffed turkey in Suffolk County prior to February 10, 1964?

A. That's right.

Q. So it was being prohibited because the weights were not stated? In other words, the weight of the turkey, the net weight of the turkey, was not separately stated from the stuffing; is that it?

A. It was not separately stated.

Q. That is the reason why you and your predecessor refused to permit the sale of these turkeys at retail in Suffolk County?

A. Right, because meats should be sold by net weight and it was not marked net weight.

Q. When you say meats should be sold by net weight, was that your interpretation?

A. Well, it was my interpretation of the law and rules and regulations as they were written.

[fol. 274] Q. And your predecessor felt the same way, that the net weight of the poultry should be specifically stated?

A. His feeling was that stuffed poultry should not be sold, period.

Q. Well now, shouldn't be sold, period, or was there any reason, was it because of other reasons than the net weight, or was it because of wholesomeness?

A. It, to my knowledge, was not because of wholesomeness, it was because of his interpretation, the fact that the law said that meat must be sold by net weight, and obviously if it had the stuffing with it, and it had one weight, it was not the net of the meat.

Q. But you feel that if the stuffed turkey had on the wrapper the net weight of the turkey and the total weight of the turkey including the stuffing,, that would have been permissible?

A. Not at that time, but now it will, because of Mr. Madden's decision.

Q. What was the decision before, wasn't it the same way, that you had to have separate weights?

A. That the stuffing shouldn't be in there at all.

Q. Will you explain that a little more? Did he refuse to permit stuffed turkey to be sold in Suffolk County or is [fol. 275] it because of the way the label read?

A. His interpretation was that the turkey or poultry is meat, and should be sold by net weight, and with the addition of the stuffing to it. And one weight being put on. It did not indicate the weight, the net weight of the meat.

Q. But if it had the two weights, it would have met with his approval?

A. I don't know.

Q. How about yourself, would that have met with your approval if it had been two weights?

A. Not up until the time I received this communication from Mr. Madden.

Mr. Kahaner: Well, I do not follow this witness, your Honor.

Judge Friendly: I think we have it as well as we are going to get it.

Mr. Kahaner: You do? Well—

Q. So that at that time, prior to writing to Mr. Madden, you had this one interpretation that you could not sell stuffed turkey in Suffolk County; is that right?

A. That's right.

Q. Then you received a call from Mr. Colavito, the attorney for Swift & Company, and he asked you the same [fol. 276] questions, didn't he, about selling stuffed turkey in Suffolk County?

A. That's right.

Q. Did you tell him that right off the bat you would not permit it?

A. I did.

Q. What made you write to Mr. Madden?

A. I spoke to Mr. Colavito.

Q. Yes.

A. He asked me what the story was in Suffolk County, and I told him; but you can say chicken or whatever you want to call it, when it's something of this nature comes up and I think there should be a decision from Albany, I write a letter to the State Director for a written decision, and I am based—I base my actions on these letters.

Q. This time, when Mr. Colavito spoke to you, you felt you wanted to get an interpretation from the State Department of Agriculture; is that it?

A. That's correct, sir.

Q. That is the reason you wrote this letter?

A. Absolutely.

Q. And you received this reply from Mr. Madden?

A. Right.

[fol. 277] Q. And the result of that reply, how do you feel about stuffed turkeys today, what must the stuffed turkeys have on the package as to weights before you permit them to be sold?

A. In my mind, according to the interpretation of the laws, rules and regulations as indicated to me by the State Director, they must have the weight of the poultry, plus the weight of the total combination package.

Q. Is that interpretation OK with you?

A. It's all right with me.

Mr. Kahaner: That is all.

(Witness excused.)

Judge Friendly: All right. We will take a five-minute recess.

(Recess.)

Judge Friendly: Any further witnesses?

Mr. Condon: Yes, I do, your Honor.

Mr. Wensing, please.

Clyde Wensing, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination.

By Mr. Condon:

Q. By whom are you employed, Mr. Wensing?

A. By the City of Newburgh.

[fol. 278] Q. What is your position there, sir?

A. Sealer of Weights and Measures.

Q. Your responsibility is just within the City of Newburgh?

A. That's right.

Q. Mr. Wensing, in your position as Sealer of Weights and Measures in the City of Newburgh—oh, by the way, how long have you been in that position?

A. Since February 1960.

Q. In your position, have you had occasion to talk with retail or wholesale food people with respect to stuffed turkeys?

A. I have.

Q. Looking at the wholesale people, what did you do with respect to wholesalers in connection with stuffed turkeys?

A. Well, I advised the wholesalers—what year are you speaking of, 1962?

Q. Let me ask you: When did you take action with respect to stuffed turkeys?

A. In 1962.

Q. All right; fine. What part of the year, do you know?

A. It was after September. It might have been in the [fol. 279] last part of October. It was three weeks or a month before Thanksgiving.

Q. All right. What action did you take? Directing your attention to the wholesalers, now.

A. I advised them that it would be illegal to sell turkeys at retail unless there was a specification for the net weight of the meat and the net weight of the dressing.

Q. What wholesalers did you advise of this illegality?

A. Well, I did advise Swift and Armour; I guess that's all that is concerned here.

Q. There were no others?

A. Let's put it this way: I advised everybody that I contacted. I can't give you a list of everybody that I contacted, but everybody that I did contact I gave them the same.

Q. Did you give the same advice to retailers?

A. I did.

Q. Can you tell us some, at least, of the retailers that you called on?

A. Well, I advised every merchant in Newburgh, I believe, unless I missed some of them.

Q. You advised them all in the same way?

[fol. 280] A. That's right.

Q. That you would have to show the separate weight of the products in order to have it legal in the City of Newburgh?

A. That's right.

Q. What were you going on for that law, where did you look for that law, Mr. Wensing?

A. I didn't look for it. I was at the public hearing—I think it was September in Albany—when the regulation was promulgated at this public hearing.

Q. This regulation was promulgated by whom, sir?

A. I believe it was by the Commissioner.

Q. The Commissioner of Agriculture and Markets of the State of New York?

A. That's right. Now, I think it was promulgated by him, yes. If I'm in error, you can find that out easy enough.

Q. You are referring—

A. To the public hearing.

Q. The public hearing was held on regulations under Section 193 of the Agriculture and Markets Law; is that right?

A. It was under regulation—yes, under Section 193.

[fol. 281] Q. The subject of stuffed turkeys, did it come up in that hearing?

A. At that hearing, yes.

Judge Wyatt: When was this hearing?

The Witness: In September of 1962 or, possibly, August now. I—I know it was before I did this, any way.

Mr. Condon: There was an admission in response to a notice to admit with respect to this hearing. I believe it was August of 1962, but I am sure it is the same hearing that Mr. Wensing refers to.

The Witness: If I remember correctly, I think there was more than one hearing. I think I went to two hearings on this. I am not sure about that, but I did go to several hearings—I attended.

Q. This subject did come up?

A. That's right.

Q. At that hearing?

A. Yes.

Q. While you were up there, Mr. Wensing, when the formal public hearings were over, did you attend the meeting in Mr. Madden's office with several other sealers and some representatives of industry and discuss this problem?

[fol. 282] A. As I remember it, I think we were just—it was informal, but after the hearing, I believe we went to Mr. Madden's office for a few minutes and talked up there, or whether it was either before the hearing or after I don't remember.

Q. But at that time did you discuss stuffed turkeys with him; do you remember that?

A. Well, I discussed stuffed turkeys quite frequently with everybody.

Q. Did Mr. Madden tell you that this was the law with respect to stuffed turkeys?

A. Not directly. As I say, I went to his public hearing and, as near as I can understand, it was promulgated—it promulgated that was the regulation, that was the law, and that later we got copies of the law through the mail.

Now, whether Mr. Madden gave—he didn't give me any direct instructions, only the bulletins and so forth that we got and the copies of the hearing came through the mail, and I acted accordingly.

Q. Do you look to Mr. Madden for interpretation of the law?

A. Well, if I have any doubts about them, I would.

[fol. 283] Q. Do you get rulings from time to time from Mr. Madden with respect to the law?

A. We get rulings of the Department. Whether there is rulings or not, I don't know.

Q. Well, actually—

A. But we get—

Q. You get rulings from the Department of Agriculture and Markets?

A. We get copies of the facts of the laws.

Q. Is it your understanding that, under the law of the State of New York, those rulings are binding upon you as the Sealer of Weights and Measures?

Mr. Kahaner: I object to that, if your Honor pleases.

Judge Friendly: I think you cannot ask him a question in precisely that form. You might ask him whether he practices or acts upon it.

Q. When you received rulings from the Department of Agriculture and Markets, do you then enforce the law in accordance with those rules?

A. Could I put this in my own words?

Q. Yes, sir.

A. Whether I have had any direct rulings from Mr. Madden, I doubt very much whether I have had any direct [fol. 284] rulings, but if I get a bulletin that so and so, that this came out in the hearings, or the facts, if I had any doubts about the interpretation, I consider him my superior, and if I asked him about it and he told me that that is the way he looked at it, I would act on his advice.

Q. You would abide by his advice?

A. I would, yes.

Mr. Condon: Thank you. That is all.

Judge Friendly: Any cross-examination?

Cross examination.

By Mr. Kahaner:

Q. Mr. Wensing, are there any stuffed turkeys being sold in Newburgh at the present time?

A. Not to my knowledge.

Q. Do you know whether they are being sold in the surrounding towns?

A. Not to my knowledge.

Q. You notified Swift and Armour that they could not sell them; is that it?

A. Yes.

Q. Unless they had what, double weights?

A. Unless they had the double weights. The reason I notified them when I did, it was, as I say, three weeks or a month before Thanksgiving, and when this regulation was [fol. 285] finally—after it was promulgated, I notified them to spare them the transportation costs, because I know they had been selling them, and that if they were going to—if they would continue selling them without me telling them different, I didn't want to wait until after they had received them and stocked them and have to reship them back, so I thought I would tell them well enough ahead of time, which I did.

Q. When you refer to the regulation, you are referring to this regulation No. 221.40 that was promulgated by the Department of Agriculture?

A. Department of Agriculture, that's right.

Q. Pursuant to 193 of the Agriculture and Markets law; is that right?

A. That's right.

Q. That regulation specifically refers to the sale of meats and poultry at retail; is that it?

A. By net weight, that's right.

Q. In other words, selling in stores direct to the consumer?

A. That's right.

Q. That says that the meat, the poultry, should be sold by net weight only?

[fol. 286] A. Right.

Q. Did you have any interpretation of that prior to 1962 by net weight? What was your interpretation of net weight?

A. Well, net weight is net weight.

Q. Net weight is the weight—

A. Before or after. You mean the net weight of the stuffed turkeys?

Q. I am asking about net weight of poultry which means what, the weight of the poultry itself?

A. That's right. Other than the tare or anything else. The net weight of the meat.

Q. Anything in addition like stuffing should be stated in the total net weight; is that it?

A. That's correct.

Q. That meets with your approval and your understanding?

A. That's right.

Q. Would you say that was a fair regulation, requirement, for your people in your community?

A. Well, it's not my position to state what is fair. I go by what the Legislature says is law. Off the record, if you want my own opinion, I would say yes.

Q. You say that Mr. Madden is your boss?

[fol. 287] A. I'd say he was my superior.

Q. Well, your—

A. He's the Director of the Weights and Measures Bureau.

Q. You are paid by the City of Newburgh?

A. That's right.

Q. You are not paid by the State, are you?

A. No.

Q. You have certain duties to perform with reference to weights and measures?

A. That's right.

Q. You exercise your discretion and you interpret laws and regulations the way you think they should be interpreted; is that it?

A. That's right.

Q. And nobody interferes with your interpretation; is that it?

A. Well, they haven't yet.

Mr. Kahaner: That is all.

Judge Wyatt: Does the City of Newburgh have any ordinance on this subject, Mr. Wensing?

The Witness: Not that I know of.

Judge Friendly: Anything further?

Mr. Condon: No further questions.

[fol. 288] Judge Friendly: Thank you.

(Witness excused.)

Mr. Condon: Mr. Van Zetta.

James A. Van Zetta, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination

By Mr. Condon:

Q. By whom are you employed, Mr. Van Zetta?
A. By the County of Orange.
Q. What is your job, sir?
A. Sealer of Weights and Measures.
Q. That covers the entire County?
A. It encompasses the whole County outside of the City of Newburgh, Port Jervis and Middletown. They have their own sealers in those three cities.
Q. Do you have no responsibilities in those cities at all?
A. None whatsoever.
Q. I see.
How long have you been County Sealer, sir?
A. A year and a half.
Q. Were you in the department prior to that time?
A. That's right.
Q. As an inspector?
[fol. 289] A. That's right.
Q. Keep your voice up so that we will be able to hear you back here, please.

Mr. Van Zetta, in the course of your experience in the Department of Weights and Measures in Orange County, have you had occasion to take action with respect to stuffed turkeys in Orange County?

A. I have.
Q. What action did you take, sir?
A. Well, I don't have any warehouses or meat making plants in our vicinity or in my County, but I do have

so-called big supermarkets, and I did go in and advise them that I didn't want to see any stuffed turkeys on the market. And, of course, they have kept to that position at the moment.

Q. Do you know when you did that?

A. I took that prior to—it was in '62, about the same time as Mr. Wensing has had gone down to Swift and also the Armour people.

Q. Subsequent to the public hearing on the regulations but prior to Thanksgiving?

A. That's right.

Q. Did you tell them that you did not want stuffed turkeys sold in Orange County at all? Is that what you said?

[fol. 290] A. I didn't give it to them that way. I just said that the rules and regulations I saw, what we got from the promulgation, stated that meat should be sold by net weight and it was my—I don't want to use the word interpretation, because I don't get paid to interpret—but it was my idea that stuffed turkey does not correspond with the rules and regulations of that particular promulgation.

Q. Do you have your own weights and measures ordinances in Orange County?

A. No, we don't.

Q. You apply what law?

A. The State of New York, Department of Agriculture and markets.

Q. The Agriculture and Markets law and the regulations promulgated by the Commissioner of Agriculture and Markets?

A. That's right.

Q. Prior to the time that you went around and talked to these retailers, Mr. Van Zetta, were there stuffed turkeys being sold in Orange County?

A. I imagine there was.

Q. You do not know one way or the other?

[fol. 291] A. I really don't know, to be honest with you; I really don't know. My predecessor had never said anything one way or the other on that.

Q. When you went around and visited these retailers in the fall of 1962, you did not see any stuffed turkeys at that time?

A. I didn't see too many of them on the market, no.

Q. Can you tell us some of the places you went and talked to some of the customers, the retailers?

A. Well, I went to our so-called—I say supermarkets such as the A & P and Grand Union and, of course, we do have two big chains up there, which in Shop-Rite, and we also have Lloyd's Supermarket, and there's quite a few other individually-owned supermarkets that do handle quite a bit of the meat business, and I walked in to those people I told them what my idea was of the stuffed turkeys, and most of them had the idea that they wouldn't handle them anyhow.

Q. You told them that they couldn't sell stuffed turkeys under any circumstances?

A. Unless they could show me the two weights, the weight of the meat and also of the stuffing.

[fol. 292] Q. As far as you know, you visited all the large supermarkets in your jurisdiction?

A. I think so, yes.

Q. Thank you.

Mr. Condon: That is all.

Judge Friendly: Any cross?

Cross examination

By Mr. Kahaner:

Q. Mr. Van Zetta, you said that there are no regulations in Orange County as to weights and measures?

A. No, sir.

Q. Could Orange County pass its own regulations as to weights and measures?

A. I think they're allowed to do it; I mean, according to the law of the State. I'm not sure. I more or less think they can do it, though.

Q. If they wanted to have a regulation as to two weights on stuffed turkeys, there would not be any prohibition; is that it?

Mr. Condon: I object to it. I do not think the witness is qualified.

Judge Friendly: That called for a conclusion of law. I sustain the objection.

Q. Did you have any discussion with anybody in the Department of Agriculture prior to coming to the conclusion [fol. 293] that the regulation provided the separate stating of weights on stuffed turkeys?

A. None.

Q. In other words, you read the regulations and that is what you interpreted as requiring the separate statement of net weight and the total weight of the bird; is that it?

A. Right.

Q. You never inquired of the defendant here, Mr. Wickham, or Mr. Madden or any of their people, whether your interpretation was correct or not; is that it?

A. No, I haven't.

Q. You just took it on yourself to interpret that regulation to mean what you just said; is that it?

A. I took it on myself. Let's put it this way: I did talk with the surrounding area, we'll say, with Mr. Wensing, who is in the City of Newburgh, who handles quite a bit of the population of the County, and who has the meat packing plants in his vicinity, and we did discuss it and we both came to the same interpretation without any coercion from anyone.

Q. Without any discussion from anybody?

[fol. 294] A. Without any discussion, right. I think if I had any idea I could have went to my District Attorney, who I am responsible to as far as any interpretation of the law.

Q. Do you know that this regulation refers only to the sale of stuffed turkey at retail; is that it?

A. I don't follow you on that.

Q. Well, this 221.40 regulation refers to the sale of stuffed turkey at retail to the consumer.

A. Well, there's nothing about stuffed turkey in 221.

Q. Well, the application of that regulation means poultry and meats must be stuffed to the consumer at retail?

A. That's right.

Mr. Kahaner: That is all.

Judge Friendly: Thank you, Mr. Witness.

(Witness excused.)

Judge Friendly: Any further witnesses?

Mr. Condon: If your Honor please, if I may have a minute to confer with Mr. Kahaner, we might be able to stipulate some of this away.

Judge Friendly: I was wondering, if they are all of the same facts, why you could not.

[fol. 295] Mr. Condon: I have more testimony of this type. I had one more witness, but he is not here and I cannot put him on.

I have a stipulation for the record, if your Honor please.

Judge Friendly: Go ahead.

STIPULATION AS TO SALES OF STUFFED AND UNSTUFFED TURKEYS

Mr. Condon: It is stipulated between the attorneys for the plaintiffs and the defendant that the sales of stuffed and unstuffed turkeys by both Swift & Company and Armour & Company in the State of New York are as follows for the following years:

First, Swift & Company unstuffed turkeys, 1960, figure not available; 1961, 12,400,000 pounds; 1962, 14,800,000 pounds; 1963, 19,623,000 pounds.

Stuffed turkeys, 1960, 167,000 pounds; 1961, 105,000 pounds; 1962, 142,000 pounds; 1963, 15,000 pounds.

For Armour & Company, unstuffed turkeys, 1960, figure not available; 1961, figure not available; 1962, 4,400,000 pounds; 1963, 3,545,000 pounds.

Stuffed turkeys, 1960, 269,000 pounds; 1961, 367,000 pounds; 1962, 524,000 pounds; 1963, 207,000 pounds.

[fol. 296] Judge Wyatt: Are they the same figures as are in the papers?

Mr. Condon: I do not think the figures are in the papers, if your Honor please.

Judge Wyatt: I have seen them somewhere.

Mr. Condon: They may be in the brief.

Judge Wyatt: Are these that you have given me the same as in the brief?

Mr. Condon: The same figures as I gave you in my brief, yes, sir.

Judge Friendly: Does that conclude the case?

PLAINTIFF RESTS

Mr. Condon: With that stipulation, the plaintiff rests.

Judge Friendly: Will you proceed, Mr. Kahaner.

DEFENDANT'S MOTION TO DISMISS COMPLAINT

Mr. Kahaner: At this time, your Honor, I move to dismiss the complaint on the grounds that the complaint fails to set forth any cause of action for any relief whatsoever; and on the grounds set forth in my brief that the plaintiffs have not standing to attack the constitutionality of this section. This section specifically has to do with the sale at retail of meats and poultry, and the cases have said that just because somebody is incidentally hurt by some regulation, [fol. 297] where the regulation does not affect them specifically, they cannot come in and attack a State regulation; and I have cited those cases, your Honor, and here we have the plaintiffs who are packers, solely packers, selling to wholesalers, but never selling to the consumers, come in and questioning the constitutionality of a regulation which applies only to sales at retail.

In other words, this is specific. It says that poultry and meat shall be sold by net weight only at retail. We do not have one retailer in here complaining as a party plaintiff to this action, we have not even got a wholesaler in here in this action who is attacking the regulation, and—

Judge Wyatt: Aren't Swift and Armour both wholesalers?

Mr. Kahaner: They are packers, your Honor. They are not attacking the wholesale regulation, they are specifically attacking 221.40.

Judge Wyatt: But they sell to retailers and, it seems to me, they could be in one aspect the wholesaler, couldn't they?

Mr. Kahaner: Yes, but they are attacking a regulation—

[fol. 298] Judge Wyatt: I understand the point. You said you do not have any wholesalers here.

Mr. Kahaner: They are packers and, presumably, at some times they are wholesalers, but they are never retailers.

And this section specifically applies to the sale of poultry and meat at retail. And the courts have held that one cannot invoke the right of others and challenge the constitutionality of State action. And I quote that action on the case against—

Judge Friendly: There is no need for long, legal argument, Mr. Kahaner. We are going to reserve decision on your motion. Proceed with the evidence.

Mr. Kahaner: Are you reserving decision on all my points on the question? There has been no discussion here as to interstate commerce.

Judge Friendly: All questions.

Mr. Kahaner: I do not even know how these turkeys that come in from another state—they have not proven anything, all they have done is said that they have a turkey that is stuffed in Wisconsin, and then that, presumably, one of these—I do not even know if they have any proof that the same turkey is sold at retail.

[fol. 299] Judge Friendly: I think they have established that all their turkeys that were offered for sale in New York came from outside of the State, but you can argue further about that when you submit any further briefs, if you wish to.

Meanwhile, we woud like to get on and finish the taking of evidence.

Mr. Kahaner: All right. Then I will proceed with the case.

Mr. Condon: If your Honor please, before he proceeds, I am a little embarrassed about this but, in fact, the regulations of the State of New York, the regulations which have been referred to so many times here, 221.40, has been superseded effective March 1, 1964 by new regulations of the Department of Agriculture and Markets, and the regulation now which has to do with the meat, poultry and fish is under 221.9 of the new regulations, which has to do with method of sale and specific commodities.

I do not think there is any subsatntial change in it with one exception, the words "at retail" no longer appear in the regulation.

[fol. 300] Judge Friendly: You can give us supplemental memorandums and tells us all about that.

Mr. Condon: I do not raise it now for the point of argument, but rather to call your attention to it.

Judge friendly: In the meantime, let us hear, in what little time remains to hear, a witness.

Mr. Kahaner: Mr. Madden.

John F. Madden, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination

By Mr. Kahaner:

Q. Mr. Madden, are you employed by the Department of Agriculture of the State of New York.

A. I am.

Q. What position do you hold?

A. I'm the Director of the Bureau of Weights and Measures of the Department of Agriculture and Markets of the State of New York.

Q. How long have you been in that position?

A. Five years next month.

Q. Did you hear the testimony of the previous witnesses? I am referring to the city sealers and the county sealers.

[fol. 301] A. Yes, I did.

Q. They refer to this Section 221.40 or certain regulations of the State.

A. Yes.

Q. Will you tell us, just to give us that section and your interpretation of 221.40, which was promulgated by the defendant pursuant to 193 of the Agriculture and Markets law.

A. Well, 221.40, presently it is 221.9, requires meat, poultry and fish products to be sold by net weight only.

Q. And at retail?

A. I'm not sure the word "retail" is in the new—

Q. How is 221.40—

A. That was retail.

Judge Friendly: We do not really need to go over that again. It is in the complaint and you have already commented on it about fifteen times.

Q. Mr. Madden, do you know about this action that was instituted about two years ago wherein the City prosecuted a retailer and Swift & Company?

A. Yes, I'm aware of that case.

Q. Were you aware of it officially; did you participate in [fol. 302] that action?

A. No, I did not.

Q. Did you know anything about the action when it was instituted?

A. No, I didn't.

Q. You found out subsequently that the retailer and Swift Company had been charged with a violation of the State regulation; is that right?

A. That's correct.

Q. And convicted?

A. That's correct.

Judge Wyatt: Is that the fact, that Swift was convicted?

Mr. Kahaner: Yes, your Honor.

Judge Wyatt: If it only applied to retail, how could Swift be convicted?

Mr. Kahaner: They never raised the question. It was never brought out.

Judge Wyatt: All right. Go ahead.

Q. Mr. Madden, what would you say is the interpretation of that section by the Department, referring to 221.40?

A. Referring to stuffed turkeys?

Q. Yes.

[fol. 303] A. My interpretation of the regulation in question is that the total weight of the turkey and the combined total weight of the product be stated on the label.

Q. In other words, you do not require that the stuffing be separately weighed and set forth on the label?

A. No.

Q. It is satisfactory to you and the Department if the net weight of the turkey is set forth and then the total net weight of the turkey with the stuffing; is that right?

A. That is correct.

Judge Wyatt: Well, you would not really use the words "total net weight of the turkey," would you, Mr. Kahaner?

Mr. Kahaner: Total gross weight.

Judge Wyatt: The net weight of the turkey.

Mr. Condon: The total net weight, your Honor. The net weight is the turkey itself without the stuffing.

Judge Wyatt: Yes.

Mr. Kahaner: The total net weight is something they refer to with the stuffing. That is how they use it.

[fol. 304] Judge Wyatt: Yes, that is my understanding. Total net weight includes stuffing as opposed to net weight of turkey, which is without stuffing.

Mr. Kahaner: That is right.

Judge Wyatt: That is right.

Q. That has been the interpretation of your department; is that it?

A. That is right.

Q. When you get inquiries from the local sealers in the State of New York, have you had occasion to send this information to them by letter?

A. Yes, I have.

Q. You have done it several times; is that it?

A. That's right.

Q. Has your department, you personally or any people under you, gone out throughout the State of New York and warned people, retailers, or Swift—retailers not to sell these turkeys?

A. No.

Q. There has never been an occasion since the law has been on the books that the State has gone out and personally notified these retailers not to sell stuffed turkeys unless they comply with this definition that you just stated?

[fol. 305] A. No, sir.

Q. Are there some places in the State of New York at the present time where Swift & Company and Armour & Company are selling stuffed turkeys?

A. When such product is marketable they do sell them in certain spots in New York State.

Q. You mean during certain seasons of the year?

A. This is correct.

Q. In other words, did you hear one of the numbers that was read out here by counsel for the plaintiffs that during 1963, I believe, over 200,000 pounds of stuffed turkey—207,000 pounds of stuffed turkey—was sold in New York State during 1963?

A. I heard that.

Q. And that Swift & Company sold 15,000 pounds of stuffed turkey in New York State?

A. I heard that.

Q. So that they are continuing to sell stuffed turkeys in the State of New York?

A. That's correct.

Q. Your department has never written to Swift & Company or Armour not to sell stuffed turkeys in this State?

A. No, we have not.

[fol. 306] Q. Do you interfere with the sale of stuffed turkeys when they come into the State of New York whether by rail or by truck? Do you stop them when they come into the State of New York?

A. No.

Q. When I say "you," does your department ever stop the shipment of these stuffed turkeys? Up to the present time, your department has never stopped the entry of these turkeys in this State?

A. No, sir.

Q. As a matter of fact, has your department ever gone into any retail establishment selling the plaintiffs' stuffed turkeys and told them not to sell these stuffed turkeys because they violated a State law?

A. No, sir.

Judge Wyatt: Do you have, Mr. Madden, inspectors or employees in all of the counties of the State enforcing the laws?

The Witness: No, sir.

Judge Wyatt: You rely on the county and city sealers?

The Witness: The Bureau of Weights and Measures has six State inspectors of weights and measures, and one [fol. 307] senior inspector who more or less spot-checks the work of the Weights and Measures officials on a local basis.

Judge Wyatt: And the Weights and Measures officials, to whom you refer, are the county and city sealers and Weights and Measures officials?

The Witness: That is correct.

Q. So that if a local sealer, county or city, does not communicate with you with reference to this regulation, you do not tell, you do not notify anybody, that these local sealers are not to permit the sale of stuffed turkeys other than those setting forth the separate weights, do you?

A. No.

Q. So all these sealers and local sealers are acting on their own as far as you are concerned and your department is concerned; is that correct?

A. That is correct.

Mr. Kahaner: That is all, Mr. Madden.
Judge Friendly: Mr. Condon?

Cross examination

By Mr. Condon:

Q. Mr. Madden, what is your relationship with the local sealers, officially, that is?

A. Well, I would say that my position as Director of [fol. 308] Weights and Measures is to make sure that the provisions of the laws relating to weights and measures of the Agricultural and Markets law are enforced in New York, and my inspectors of the Bureau spot-check weights and measures works in the various counties to ascertain whether the work is being accomplished, and my inspectors work with the local Weights and Measures officials.

Q. When you say all the local sealers are acting on their own, you do have supervision over them, don't you?

A. Section 180 states—or let me say it this way: Section 180 of the Agriculture and Markets law states that the Commissioner shall promulgated rules and regulations and issue instructions to the local Weights and Measures officials and such instructions shall be binding. That is as far as the supervision we have.

Q. Actually, I believe there is a word in there "rulings," isn't there?

A. What's that?

Q. The word in 180 is "rulings," isn't it? The Commissioner or the Director shall issue rulings and the rulings shall be binding upon the local sealers?

[fol. 309] A. I would like to check on that, counselor.

Q. Why don't you do that.

A. If may.

> "And he shall issue instructions to the county and city sealers and these shall be binding upon and govern said sealers in the discharge of their duties."

Q. I see.

What kind of instructions do you issue to them?

A. Well, for instance, when a Weights and Measures official is appointed by a governmental body, we train him to his new duties.

Whenever he asks for advice, we try to give him an interpretation for his use. We do not send out blanket interpretations because we feel that his department is a part of a local governmental function and in that governmental function there is a legal department, and that legal department's responsibility is to make interpretations, and that legal department probably wouldn't want to be prosecuting a case under other interpretations. However, when we are requested for an interpretation, we issue it.

[fol. 310] Q. When you are requested for an interpretation and issue it, you expect it to be followed; is that right?

A. Not necessarily. A Weights and Measures official has, by law, the power to decide what to do when he finds a violation. That is in 182 of the Agriculture and Markets law.

Q. What is the function of your six or seven State inspectors?

A. The function of my men or the State inspectors of weights and measures are to ascertain if the provisions of the laws relating to weights and measures are being enforced in New York State.

Thus, by spot-checking the local Weights and Measures officials, which are appointed on a local basis, they do this, they carry out their responsibilities.

Q. Suppose they find out that the Weights and Measures laws are not being enforced in a particular area, what happens then?

A. Then they report this to me and I personally confer with the governing body involved, submit them reports of the findings, and ask them for their cooperation in seeing that the laws are enforced in that jurisdiction. This has [fol. 311] happened many times.

Q. You do that frequently?

A. Quite often.

Q. Go around and talk to these people and point out that the law is not being enforced the way it should be in their area; is that right?

A. Yes.

Q. It is true, isn't it, Mr. Madden, that the regulations which became effective a week or so ago, on March 1, 1964, as I think you referred to was 221.9, no longer have the magic words "at retail" in them; is that right?

A. I would like to check that, if I may.

Q. Please do.

A. The word "retail" is not in the regulations at the present time.

Q. That is, the regulation that is currently in effect in the State of New York?

A. That is correct.

Q. Mr. Madden, I think you testified that you were aware of the criminal prosecution of Swift and Trund's, but did not participate in it; is that correct?

A. That's correct.

[fol. 312] Q. Do you know, from your expert knowledge of the movement of the laws and regulations in Albany, whether or not Section 193, in its present form, was the law at the time of that case, and this is April of 1962?

A. No, it was not the law at the time.

Q. 193 has been changed since April of 1962?

A. This is right.

Q. Was Regulation 221.40, which we have talked about, the predecessor of the new 221.9; was that in effect in April of 1962?

A. No, it was not.

Q. Do you know when 193 was changed, the effective date of the change?

A. Yes. It became law, I'm sure, in the first part of 1963, and the rules and regulations were changed in August of 1962.

Q. If I suggested to you that the new 193 became effective September 1, 1962—

A. That's right.

Q. —would that be all right?

A. That's right. I remember.

Q. Your regulations, 221.40, were they tailored to become effective at the same time?

[fol. 313] A. They were promulgated so that they would supplement Section 193 of the new law.

Q. The new 193?

A. That's right.

Judge Friendly: I take it you are not going to be able to finish this evening?

Mr. Condon: I do not think so, your Honor.

Judge Friendly: Off the record.

(Discussion off the record.)

Judge Friendly: We will adjourn until 10.30 tomorrow morning.

(Adjourned to March 11, 1964, at 10.30 a.m.)

[fol. 314] New York, March 11, 1964;
10.30 o'clock a. m.

HEARING RESUMED.

Judge Friendly: Will you proceed, Mr. Condon. I think Mr. Madden was on the stand.

Mr. Condon: Yes, sir.

JOHN F. MADDEN resumed.

Cross examination.

By Mr. Condon (Continued):

Q. Before we adjourned on yesterday, Mr. Madden, we referred to the new regulation that went into effect on March 1st, 1964, and so it will be clear I want to ask you this question: Under that new regulation, as it is now in effect, is there any change in the interpretation of the law with respect to stuffed turkeys and the application of single or multiple weights?

A. There is no change.

Q. There is no change; it is still the same as it was prior to the new regulation?
[fol. 315] A. That is correct.

Judge Friendly: Are you going to give us copies of that new regulation, Mr. Condon?

Mr. Condon: I would be happy to, your Honor.

Judge Friendly: You can send it in later.

Judge Wyatt: Was the principal change, Mr. Madden, made by the new regulations to make them specifically applicable to everybody, whether retailers or wholesalers?

The Witness: That is correct; yes, sir.

Q. Do you have a copy of that with you, Mr. Madden?

A. Yes, sir.

Q. The regulation to which we are referring is 221.9 subdivision C, is that correct?

A. That is correct.

Q. Would you read that for us.

A. "Subdivision C. Meat, poultry and fish. Except for immediate consumption on the premises where sold or as one of several elements comprising a ready-to-eat meal, sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat food products, poultry, whole or [fol. 316] part, and all seafood, except shellfish, offered or exposed for sale or sold as food shall be offered or exposed for sale and sold by net weight. The meaning of the words meat and meat food products, as used in this section, is that defined in Section 96(G) of the Agriculture and Markets Law."

Q. Mr. Madden, you testified in your examination before trial that in response to an inquiry from the Sealer of Dutchess County, you had written him with respect to the interpretation of the law of stuffed turkeys.

A. That is correct.

Q. And on yesterday Mr. Kerbs testified here and we introduced exhibits in evidence indicating that you had written to him, the Sealer in Suffolk County, along the same line.

A. That is correct.

Q. When you wrote those interpretations to those Sealers, Mr. Madden, was it your expectation that they would follow them in the application of the law?

A. Not necessarily. I felt that they wanted some interpretation as a guide for them to use.

Q. You didn't expect that they would follow it in en- [fol. 317] forcing the law?

A. Not necessarily.

Q. Mr. Madden, I show you a photocopy of a letter and ask if you will identify it, please.

A. Yes, this letter was written to Mr. E. E. Palmer, Manager, Poultry and Egg Division, 2515 Northeast Kennedy Street, Minneapolis 13, Minnesota. It was addressed to Mr. Palmer and signed by George W. Gloning, Jr., Assistant Counsel of the Department of Agriculture, Markets.

Mr. Condon: May I ask the Court's pardon and counsel's pardon, too, for not having this marked for identification before I did that.

Judge Friendly: Now you can rectify that.

Mr. Condon: Would you mark it for identification, please.

(Plaintiffs' Exhibit 12 marked for identification.)

Q. Who is Mr. Gloning?

A. Mr. Gloning is Assistant Counsel to the Department of Agriculture, Markets, of the State of New York.

Offer in Evidence

Mr. Condon: I offer the letter in evidence.

Mr. Kahaner: If your Honors please, I object to the in- [fol. 318] troduction of this letter in evidence on the ground that it is specifically stated here that this response to your inquiry is unofficial and informal.

Judge Friendly: May I see it?

Mr. Kahaner: The last paragraph.

Judge Friendly: We will receive it subject, of course, to the qualification that is expressed in it to which you referred.

(Plaintiffs' Exhibit 12 for identification received in evidence.)

Q. Is Mr. Gloning a lawyer in the department that handles most of the work with the Bureau of Weights and Measures?

A. Yes, he does quite a bit of it; that is correct.

Q. In his letter, Plaintiffs' Exhibit 12, Mr. Gloning says:

> "In answer to your question as to where you stand in regard to the distribution of your product in this State, I can only state that in view of the Governor's veto of legislation specifically permitting the sale of such a product by total net weight declaration, the dis- [fol. 319] tribution and sale of stuffed poultry in New York State can only be permitted if the weight declaration shows the net weight of the turkey, the net weight of the stuffing and the total net weight."

Do you agree with that, Mr. Madden?

A. No.

Q. You do not. Mr. Gloning was wrong, wasn't he, when he said that?

A. Apparently Mr. Gloning was in error because Mr. Gloning wrote the interpretation that I sent the two Sealers.

Judge Wyatt: The error, I take it, Mr. Madden, to which you are referring is the requirement about a separate weight for stuffing?

The Witness: That is right.

Judge Wyatt: You have in mind only two weights on the package?

The Witness: That is correct.

Q. Mr. Gloning further says in his letter, Mr. Madden:

> "In an attempt to resolve the problem at the request in industry, a bill was introduced into this year's session of the Legislature. The bill would have permitted [fol. 320] the sale of combination foods or food products with a declaration of the net weight of the combination product and was identical in wording with Section 32 of the model state law on weights and measures, adopted by the 27th National Conference on Weights and Measures 1962."

Is that correct, sir? Do you agree with that?

Let me break that down.

A. Yes, I was going to say there are two questions in one there.

Q. Right. Do you agree that the bill, as introduced in last year's session—he was writing this in 1963—

Mr. Kahaner: Your Honor—

Q. —would have solved this problem?

Mr. Kahaner: Before you answer, I object to any bill that was introduced. We have the law as it is today. What happened prior has no connection with this case at all and as Mr. Gloning said, first of all, this letter is to somebody else not a party to this lawsuit. He says it is unofficial. It is more of a personal letter. I don't think any evidence [fol. 321] should be brought in of what laws were in effect at one time or what might have been intended. We have a law on the books at the present time and that is the only thing that we should be concerned with and nothing else.

Judge Friendly: Of course, we can take judicial notice of what bills were introduced into the Legislature. I wonder how helpful this is going to be, Mr. Condon? What difference does it make what the witness thinks about it all?

Mr. Condon: I think it is appropriate, if your Honors please, that we attempt to get some expression of Mr. Madden's opinions.

Judge Friendly: He has given you his opinion in his instruction. What difference does it make what he thinks about the bill and whether he agrees with the bill that was introduced or not? We can assume that what his counsel stated is a fact. You have your letter in evidence, what more do you need?

Mr. Condon: On the examination Mr. Hauver, if your Honors please, we went into at great length Mr. Hauver's opinions as to whether or not the Federal position was the best position and things of that type. It seems to me that it [fol. 322] would be appropriate to do the same thing here.

Judge Friendly: If you want to ask him what the reasons were for the State's position, go ahead and ask him, but I don't see why you are asking him about all these bills.

Mr. Condon: It may be just my clumsy way of getting to the problem, if your Honor please.

Judge Friendly: I will sustain the objection.

Q. Mr. Madden, is it your opinion that the present law, as it is interpreted by your department, is appropriate for the protection of the consumers in connection with stuffed poultry?

A. Yes.

Q. Do you think it is an enforcible law?

Mr. Kahaner: I object to that, if your Honor please.

Judge Friendly: Sustained.

Q. Do you think it is practical from the standpoint of Weights and Measures enforcement?

Mr. Kahaner: I object to that.

Judge Friendly: Overruled, you may answer.

A. My answer to that "is practical" is no. I would like to give a statement explaining my answer.

[fol. 323] Judge Friendly: Please do.

Q. Please do.

A. Weights and Measures work is a two-sided picture and not only protects the consumer, but it shoud also cooperate as much with industry as possible because Weights and Measures work has a great deal to do with the economies of the State or the locality in which this administration is being administered.

It is no purpose of a Weights and Measures official to create a burden on any person, firm or corporation. It is a purpose and an objective, I think, to help business and industry as much as possible. But, on the other hand, a firm and strict interpretation of the law should be administered and enforced.

Now, when an inspection is made of meat or meat products in stores, an inspector goes into the store as a customer. He would take a carriage, go to the meat department, pick 50 or 60 packages of meat at random, take them to the back room where the meat was originally weighed, check the scale for accuracy and then check the packages to see if the weights are accurate.

Here we come with stuffed turkeys. They are in a [fol. 324] frozen state. It would take time to thaw it. I suppose it is possible to check the weight of the dressing in a turkey, but I think that you have to term such an inspection impractical if you follow your schedule that has been assigned to you day after day, month after month and complete your work load. Thus, too, it would necessitate inspectors, perhaps, purchasing turkeys to take home to thaw out, to take the stuffing out of the turkey, et cetera, et cetera. This is why I think that it is not practical.

But, while I am saying this, counselor, I want to say this also: That it has been my opinion and I have been told by industry in the past that they used a formula when putting dressing in turkeys and the formula was 16 to 25 per cent. In other words, a 5-pound bird would have a pound of dressing in it. et cetera.

Can I refer to testimony that I heard?

Judge Friendly: Yes.

A. (Continuing) I heard testimony at this trial that the weight of the amount of dressing could be determined by the pressure that is put on the device. In other words, a little pressure means light dressing, heavy pressure would [fol. 325] mean heavy dressing. This is pure estimation. This is no weight control and I think this is wrong. I think there must be some more accurate way of putting dressing in a turkey.

Q. Mr. Madden, this section of the regulations with which we are dealing here, it's not a tricky regulation, is it?

A. No, it is a meat regulation.

Q. Meat, poultry and fish?

A. Meat, meat products, poultry and fish.

Q. So, your rulings would apply equally to all combinations which contain meat, poultry or fish?

A. Yes, this is true.

Mr. Condon: That is all.

Judge Friendly: I would like to ask you a question.

How do you deal with some of these other combination products that have been talked about like chicken dinners and so forth?

The Witness: This is a very good point and it comes into the practical phase of the work. It is impossible to check the weight of the ingredients of the different products, such as TV Dinners, ravioli, hash, pork and beans, [fol. 326] et cetera. In my 22 years experience it has been impossible and I assume all through the history of this.

Judge Friendly: In those products do you require a separate statement of the meat content and the non-meat content?

The Witness: No, I don't.

Judge Friendly: What about the instance of breaded chicken that someone gave? Do you allow that to be sold without a separate statement?

The Witness: Yes, it has been sold in the past and we have had conferences with industry about breaded veal cutlets breaded chicken, garnished hams and stuff like this. These are all the combination packages and they have been sold as a unit.

I will say this: That I am very thankful that this matter has come to a conclusion so that we will have a decision of how to be guided on it.

Judge Friendly: Anything further?

Judge Wyatt: I wanted to ask Mr. Madden a question, if I may.

Mr. Madden, the expression is used here about your interpretation or the Commissioner's interpretation of the [fol. 327] law. Is it an interpretation or isn't it a regulation?

The Witness: Well, the regulation was promulgated by the Commissioner. The letters that are sent out is termed an interpretation by the Legal Bureau. Interpretation of the regulation.

Judge Wyatt: I don't recall the exact wording of the regulation, but doesn't the regulation in terms require the net weight of the meat or poultry?

The Witness: The regulation, yes.

Judge Wyatt: So that it isn't a question of a change in your, Mr. Madden's interpretation. The regulation would have to be changed?

The Witness: Oh, definitely.

Judge Wyatt: To permit the sale of this product, so far as New York is concerned, without a separate statement of the weight of the turkey?

The Witness: That is correct.

Judge Wyatt: The regulation would have to be changed?

The Witness: I would say both the law and the regulation.

Judge Wyatt: You think the law woud have to be changed?

[fol. 328] The Witness: Yes, sir.

Judge Croake: In these letters that you sent, which were interpretations, are they your interpretations or of the Legal Department?

The Witness: Of the Legal Department.

Judge Croake: And they went out over your signature?

The Witness: That is right.

Judge Croake: Do you have any knowledge, Mr. Madden, as to whether or not any packer, any company at any time ever brought any proceeding in the state courts to test the interpretation of this statute?

The Witness: No, they didn't, not to my knowledge.

Judge Croake: Thank you.

Judge Friendly: Anything further, Mr. Condon?

Mr. Condon: I have nothing further.

Judge Friendly: Mr. Kahaner?

Mr. Kahaner: I have a few questions.

Redirect examination.

By Mr. Kahaner:

Q. Mr. Madden, I understand effective as of March 1st we have a new regulation, is that it?

[fol. 329] A. That is correct, counselor, yes.

Q. That regulation is 221.9?

A. That is correct.

Q. That was promulgated by the Commissioner?

A. That is right.

Q. And you have read it and the 221.40 that was mentioned in plaintiffs' complaint is no longer on the books?

A. No, it has been repealed.

Q. Have you been asked by any of the Sealers to give an interpretation of the new regulation?

A. No, I haven't.

Q. Have you or anybody in your department enforced this new regulation since it has been in effect on March 1st?

A. Relative to stuffed turkeys?

Q. Yes.

A. No, I haven't.

Q. A question has been coming up intermittently about what to do about these dinners that have all these different vegetables and all that. Am I right in saying that this new regulation exempts these dinners from requiring the net weights to be put on?

A. The new regulations would exempt some parts—some [fol. 330] some types of dinners, counselor. For instance, we have stands on the highways and they sell chicken dinners. For instance, a bucket of chicken and then they give you a muffin, cole slaw, et cetera. They can eat this on the premises and they can take it home, if they wish, if it is a dinner. But if they only sell a bucket of chicken or a bucket of shrimp, then they must sell that by weight, if that is not a dinner.

Q. In other words, one of the parts in this regulation says except for ready-to-eat meat meal sold as a unit for consumption elsewhere?

A. That is right.

Q. Mr. Madden, you said in response to Mr. Condon's question that it would probably be impractical. You haven't made any test of this, have you, to know whether it would be practical or impractical?

A. I have made a very thorough study of it, counselor, two or three years ago.

Q. What you mean by practical probably means a lot more work on your department, is that it?

A. Oh, yes, this is true.

Q. You would need more money in the budget to buy [fol. 331] more stuffed turkeys?

A. And more men.

Q. In other words, you have the same trouble as the Federal is talking about?

A. This is true.

Q. The reason that they don't have this type of regulation for two weights is that they haven't got enough men to observe these weights?

A. That is right.

Q. But that is about as much as it is. Otherwise you could really take the stuffing out and determine the weight of the stuffing?

A. Oh, there is no question a test can be made of it.

Q. Mr. Madden—

Mr. Kahaner: I offer this first for identification. It has two weights on it. I just want to know whether it will be acceptable by the State. I just want to offer it for identification. I offer this for identification.

(Defendant's Exhibit G marked for identification.)

Q. Mr. Madden, the State requires, you have testified, two weights?

[fol. 332] A. Correct.

Q. The net weight and the total weight?

A. Correct.

Q. Would the State have any objection to having a label on the package which would comply with the Federal and likewise comply with the State?

A. No objection.

Q. I show you a typical package, which was made up by the Rock Cornish Game Hen people, I showed some of these packages before, and will you look at this label, the second label which gives—as a matter of fact, that gives three weights. It gives the weight of the bird, the weight of the stuffing and the total net weight.

A. Yes.

Q. You wouldn't require the three weights, is that it?

A. No, two weights.

Q. Would that label as it is set up, which has the label which is required allegedly by the Federal Poultry Inspection Service and also another label which is attached showing the weight of the bird, the weight of the stuffing and the total weight, that would be OK with your department, [fol. 333] is that right?

A. Correct.

Q. As a matter of fact, you would only require two weights on the second label?

A. That is right.

Offer in Evidence

Mr. Kahaner: I offer this into evidence.

Mr. Condon: I have no objection.

Judge Friendly: Received.

(Defendant's Exhibit G for identification received in evidence.)

Q. I just want to clear something up, Mr. Madden: Mr. McKnight in his testimony said that he was told by one of his store managers that a Mr. Osinger from the State Inspector had told him something about weights; that he couldn't sell stuffed turkeys unless there were two weights on it. Has there ever been a Mr. Osinger connected with your office?

A. No. We never had a person by the name of Osinger on our staff.

Mr. Kahaner: That is all.

Recross examination.

By Mr. Condon:

Q. I just have a couple of questions, Mr. Madden. Am I right that the meals that are exempted from this weight requirement in the new regulation are meals which are [fol. 334] ready to eat?

A. This is correct.

Q. This is opposed to a TV Dinner, for example, that must be cooked?

A. This is correct.

Q. One other thing: In making the inspection, which you say can be made, of stuffed turkeys, it is necessary for your inspector to destroy the product as stuffed turkey in order to check it, isn't it?

A. Unless he buys it for himself, I would say so.

Q. Even if he buys it for himself, he destroys it as a stuffed turkey once he takes the stuffing out, doesn't he?

A. He might consume it himself.

Q. True. When you make an inspection of unstuffed frozen turkeys, your inspector could check the weights on all the turkeys in the case, couldn't he?

A. Oh, yes; we do that every day.

Q. If he did that with all the stuffed turkeys in the case, he would put the merchant out of the stuffed turkey business for that day, wouldn't he?

Mr. Kahaner: I object to that.

[fol. 335] Judge Friendly: I think that is fairly obvious.

Mr. Condon: That is all, Mr. Madden.

Judge Friendly: Thank you very much, Mr. Madden.
Mr. Kahaner: One question.

Redirect examination.

By Mr. Kahaner:

Q. When Mr. Condon said you examined every stuffed turkey in a retailer's business, all you would have to do is sample check, one or two?
A. One or two or three.

Judge Friendly: You may be excused.

(Witness excused.)

Judge Friendly: Call your next witness, please.

Esther E. Hendler, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Kahaner:

The Witness: Inspector Esther E. Hendler, shield No. 90.

Q. Mrs. Hendler, what job do you hold with the City of New York?
A. Senior inspector, New York City Bureau of Weights [fol. 336] and Measures, Department of Markets.
Q. How long have you been in that capacity?
A. A little over ten years.
Q. As part of your job, what do you inspect?
A. I am assigned to a special investigation squad on consumer frauds in relation to weights and measures and misleading advertising.
Q. Mrs. Hendler, do you recall making the complaint against a retailer and Swift & Company sometime in 1962?
A. Yes, sir; I do.

Q. What was that complaint about?

A. An advertisement appearing in a New York daily newspaper. I believe it was about April 18th of 1962 advertising stuffed Butterball Swift turkeys at 39 cents per pound.

Q. Prior to making that complaint, did you go into the retailer's establishment?

A. I did.

Q. What was the name of the retailer?

A. Trund's.

Q. What was the City concerned about at that time in sending you to make your inspections; did it have to do with the weight of the turkey?

[fol. 337] A. Yes, sir.

Q. Was it the fact that there were no separate weights stated on the turkey as to the stuffing and the net weight of the turkey?

A. Yes, sir.

Q. You went into the store—did you get in touch with the State or any person in the State prior to making your complaint or investigating the Trund store?

A. May I explain about the complaint?

Q. No, did you get in touch with anybody in the State?

A. No, sir.

Q. This was part of your job with the City of New York?

A. Everyday job.

Judge Wyatt: I don't quite understand what you mean by "complaint." Is that a word of art here meaning complaint, to initiate a proceeding, or is it just a general—

Mr. Kahaner: Actually they filed an information.

Q. Is that it, Mrs. Hendler? Will you explain that to the Judge.

[fol. 338] A. Subsequent to the court's summonses issued to defendants returnable to the Criminal Court, New York City, an action was instituted in Kings County Criminal Court.

Judge Wyatt: Based on your complaint?

The Witness: Based on the results of an investigation made on Trund's Stores, Inc.

Judge Wyatt: By you?

The Witness: By me as assigned by my department. The complaint Mr. Kahaner refers to is the affidavit which an inspector turns in.

Judge Wyatt: That answers my question. I just wanted to know what we meant by complaint.

Q. Did you go into the Trund store and purchase a turkey?

A. Yes, two turkeys.

Q. Do you remember the weight of one of the turkeys?

A. Yes, I do.

Q. What did it weigh?

A. It was marked in the box usually on the CRY O VAC container usually provided for the net weight of the meat product, it was marked 7 pounds 4 ounces, including dressing, underneath that.

[fol. 339] Q. In other words, it did say "including dressing"?

A. Yes, I believe it is one of your exhibits.

Q. Which is it, Armour or Swift that has "including dressing"?

Mr. Condon: Swift & Company does have it.

Mr. Kahaner: And Armour doesn't.

Q. Then did you take the stuffing out subsequent to purchasing the bird?

A. I purchased two turkeys, one was labeled 7 pounds 4 ounces and one was labeled 7 pounds 8 ounces.

One turkey was left in its entirety as purchased for court evidence and one marked 7 pounds 4 ounces was examined.

Q. What did you find?

A. In my department.

Q. You brought it back to your department?

A. Yes, sir.

Q. What happened?

A. We found the stuffing, the bread stuffing enclosed in the cavities of the said turkey to weigh 2 pounds and 2 ounces.

We found the meat to weigh 5 pounds 2 ounces.

I did not charge short weight because that was not what [fol. 340] I was investigating. I was investigating these turkeys because of section— the original Section 193 of the State Agriculture and Markets Law under Rules and Regulations 8(A) which defined poultry as meat and must also be sold with net weight.

This excluded any added substance of any kind in the meat product. As far as we were concerned, meat and meat products meant just that, no added substance of any kind.

Q. Were you a witness at the trial?

A. I was.

Q. By the City against Trund's and Swift & Company?

A. Yes, the People of the State of New York versus Swift and Trund's.

Q. Was anybody there from the State at all; did the State participate in that case?

A. Do you mean the State Department of Agriculture and Markets?

Q. Yes.

A. No. We enforce the State laws. We are empowered to do that.

Q. The District Attorney of Kings County tried this case?

[fol. 341] A. Yes, the District Attorney of Kings County.

Q. At that trial did counsel for the defendants try to prove that poultry was not meat; is that what the main defense was?

A. That was one of the main issues argued, yes, that poultry was not meat.

Q. Then I understand that Mr. Hauver was there at that time?

A. Mr. Hauver was present as a witness.

Q. And he tried to testify about the Federal regulations?

A. He was not permitted to be recorded because the charges were on a State violation, not Federal.

Q. But they actually tried the issue of this supremacy, that the Federal statute took over, is that it?

A. It was not permitted in the record.

Q. In other words, that they were within the Federal statute and, therefore, didn't have to comply?

A. It was not permitted during the trial. Objections were sustained throughout the trial.

Q. Were they convicted, both defendants?

A. Yes, they were found guilty, both defendants, on the statute.

[fol. 342] Q. Was an appeal ever taken?

A. Not to my knowledge. This is the first action I ever became aware of.

Q. There was no appeal ever taken from the trial and conviction of the defendant Trund and the defendant Swift?

A. No, sir; I have no knowledge of any.

Q. Mrs. Hendler, would you say that 2 pounds 2 ounces of stuffing was a proper amount of stuffing to put in a 5-pound bird?

A. You want a personal opinion?

Q. Yes, as a housewife.

A. As a house wife of 24½ years?

Q. Yes.

A. If I could describe the way the appearance and the condition of the way the bread stuffing was stuffed into the turkey, which I examined, and I want to qualify something before I go any further. We never claimed anything against the quality of the Swift product.

Q. We are not going into that, no.

A. It had nothing to do with quality.

Q. Just the amount of stuffing and how it was stuffed.

[fol. 343] A. I just wanted to qualify that for the record. Never any qualms about quality. It was packed extremely tightly. I don't think the average housewife would pack stuffing of any sort as tightly as we found it. It was crammed in. That particular one that I examined, extremely packed, tightly packed. I would not—I, personally, and I don't know of anybody that would. I can't see the purpose.

Q. Would you say ordinarily that half the amount of stuffing would have been a proper amount?

A. Well, much less than what I found in there. I won't pin it down.

Q. It was 2 pounds 2 ounces. How much would you say would have been a normal amount, give or take a few ounces?

A. Approximately?

Q. Yes, approximately.

A. Maybe half. Maybe a little more than half, but not quite as much as was in there. It was extremely packed. There was no end to pulling it out.

Q. Mrs. Hendler, since this action was instituted by the plaintiffs, has the City of New York its own law now regarding weights and measures?

A. Yes, sir.

[fol. 344] Mr. Condon: I object to this. I don't think it is pertinent here.

Mr. Kahaner: Your Honor, they claim that most of their business is done in the City of New York and that is one of the complaints they make is that they haven't been able to sell turkeys in the City of New York and I want to show that the City of New York has its own regulations.

Judge Friendly: So what would that prove?

Mr. Kahaner: That no matter what happens with this case, they still have a regulation.

Judge Friendly: If we decide in their favor, they might bring another case, but I don't see what the relevance of that would be.

Mr. Kahaner: I want your Honor to take judicial notice of the fact that we say that these localities may pass their own laws with reference to weights and measures.

Judge Friendly: We understand. I don't think you need to pursue it.

Mr. Kahaner: The City, itself, has passed—

Q. Effective when?

A. It was proposed to the City Council about the time that we took the action under the State law, the old one [fol. 345] under 93 in the Criminal Court.

Q. When was it passed?

A. It is effective as of October 1963.

Judge Friendly: I think that is sufficient on that subject.

Mr. Kahaner: Can I ask one question?

Q. Does the City ordinance require that poultry and meats be sold by net weights only and they particularly say no stuffing?

A. The true weight of frozen poultry shall be the net weight thereof, exclusive of any food product or substance added or combined therewith, and all such commodities and articles of merchandise shall be weighed or measured by duly tested devices, et cetera.

Mr. Kahaner: That is all.

I could, if your Honor would like, for your Honors' information, I had a copy of the law.

Judge Friendly: The City ordinance?

Mr. Kahaner: Yes.

Judge Croake: It is attached to your brief.

Mr. Kahaner: Shall I mark it in evidence?

Judge Friendly: It is not necessary; we can take notice of it.

[fol. 346] Mr. Kahaner: You will take judicial notice of it?

Judge Friendly: Yes.

Mr. Condon.

Cross examination.

By Mr. Condon:

Q. Mrs. Hendler, do you know what the stuffing weighed in that turkey when it was packed in Minnesota?

A. No, sir.

Q. Do you know what the turkey weighed when it was packed in Minnesota?

A. No, sir. I weighed it in the Department of Markets.

Q. Did you weigh it yourself?

A. Yes, sir, in the presence of others, Mr. Condon.

Q. To go back to your other capacity for a minute, if we may, Mrs. Hendler, I will ask you a question as a housewife. Do you stuff your own turkeys at home?

A. I sure do.

Q. Have you ever weighed the stuffing that you put in one of your own turkeys?

A. No—after the stuffing is prepared?

Q. Yes, ma'am.

A. Or do you mean the quantity of ingredients that I [fol. 347] will use to prepare the stuffing?

Q. The question is after you get your stuffing prepared, have you ever weighed it?

A. Not after I have prepared the stuffing.

Mr. Condon: Thank you.

Redirect examination.

By Mr. Kahaner:

Q. Going into that, Mrs. Hendler, you have been stuffing 9 and 10-ponud turkeys?

A. That is an average turkey.

Q. What is the weight of the bread that goes into that 9 and 10-pound turkeys?

A. I would use approximately a pound loaf, maybe a pound loaf in a 10-pound bird.

Q. How much would be the weight of the other ingredients?

A. A couple of eggs, some spices, herbs, a little celery.

Q. How much would that weigh, a quarter of a pound tops?

A. Maybe it would go a little more than that.

Q. So, for a 9 or 10-pound turkey you put stuffing in that weighs about a pound or pound and a quarter?

A. I think it would be a pound and a half tops if the [fol. 348] eggs weighed more.

Q. That is for a 9 or 10-pound turkey?

A. Yes.

Mr. Kahaner: That is all.

Recross examination.

By Mr. Condon:

Q. Just one more question, Mrs. Hendler.

Judge Friendly: We are getting awfully hungry here.

Q. Do you add any water to these ingredients before you put them in the turkey?
A. In my own stuffing?
Q. Yes.
A. Just a little bit. Just enough to moisten the bread.
Q. You do add some?
A. A little. Maybe milk rather than water. It varies, depending on the type of stuffing. That is why I use eggs.

Mr. Condon: That is all.
Mr. Kahaner: That is all.
Judge Friendly: Thank you, Mrs. Hendler.

(Witness excused.)

Judge Friendly: Do you have any other witnesses?
[fol. 349] Mr. Kahaner: No, your Honor.
Judge Friendly: Both sides rest, then.
Do you have anything further?

PLAINTIFFS' MOTION TO AMEND COMPLAINT AND COLLOQUY THEREON

Mr. Condon: I would like to make a motion, if I may, if your Honor please, a separate one.

I would like to move to amend my complaint to include reference to the regulation which is now in force in the State of New York supplementing 221.40, which was in effect at the time this action was commenced, which has been superseded by 221.9(C) about which we have heard testimony today and which, according to Mr. Madden's testimony, has the same effect with respect to this product.

Judge Friendly: Is there any objection to that?

Mr. Kahaner: I do, your Honor. This is a new section which went into effect March 1st. It covers much more than the old section did. There has been no evidence here that anybody has asked the Department of Agriculture for their specific interpretation of this. It hasn't even been mentioned in this case except for the last—since yesterday, that there is a new Section 221.40—

Judge Friendly: It only became effective March 1, didn't [fol. 350] it?

Mr. Kahaner: I know.

Judge Friendly: It couldn't have been mentioned much sooner.

Mr. Kahaner: Exactly, that is why I don't see why this amendment is proper. We are not discussing the new section.

Judge Friendly: May we see the amendment, please?

We are going to allow the complaint to be amended on the condition that Mr. Condon supplies us with an adequate number of this regulation.

Mr. Condon: This I shall do, sir.

Mr. Kahaner: Suppose I give you three right now.

Judge Friendly: You are taking on your adversary's burden very generously.

Mr. Condon: Thank you, sir.

Judge Friendly: Both sides rest now.

What is your desire, gentlemen, with regard to furnishing further briefs? Do you want to do that or do you think your present briefs cover the matter adequately?

Mr. Condon: I would like to have an opportunity to [fol. 351] comment in writing on the effect of the evidence, if I may, your Honor.

Mr. Kahaner: I might want to do that, your Honor, because I feel that as I see it no evidence was introduced that any of these turkeys ever came into New York State. I don't think that there has been any testimony here of commerce.

Judge Friendly: We will give you both an opportunity to write further briefs and you can make up your own minds as to what you want to cover in them.

There is one point that the Court would like to have you both think about, or two points. First is the matter you were discussing yesterday as to the legal effect of the failure on the part of Armour & Company to take matters up to the higher level than the Department of Agriculture or ultimately to the Court and also the question whether they were under any obligation to test out the State construction of the regulation by some proceeding before coming here.

Obviously, in asking that those questions be briefed, we are not intimating any views. We would just like to have help.

How much time do you want, Mr. Condon?

[fol. 352] Mr. Condon: I would like to have, if I may, your Honor, about two weeks after the receipt of the transcript.

Judge Friendly: The 7th of April. Is that agreeable to you, Mr. Kahaner?

Mr. Kahaner: How much time after April 7th do I have to answer.

Judge Friendly: I thought you would just exchange briefs. I should think you know enough about each other's positions now that you don't need anything further. If after you have gotten the other side's brief you feel there is still something we need to know, why I assume we will give you permission at that time. I would hope that one more exchange would drain the pitcher.

Very well, then, the case will be deemed submitted. Both sides to exchange briefs on April 7th—on or before.

Mr. Kahaner: If the Court please, in other words, we don't have to go into the other facets of this case that has been briefed previously?

Judge Friendly: No, not unless you feel you want to add [fol. 352a] something to them. You have complete discretion on this question as to what you want to put in and comment on.

Mr. Kahaner: Thank you.

Judge Friendly: Thank you, gentlemen.

Reporters' Certificate to foregoing transcript (omitted in printing).

[fol. 353]

PLAINTIFFS' EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
63 Civil 3085

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY, Plaintiffs,

—against—

DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York, Defendant.

REQUEST FOR ADMISSIONS

SIRS:

Plaintiff, SWIFT & COMPANY, INC., requests defendant DON J. WICKHAM, within ten days after service of this request, to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

That each of the following statements are true:

1. That the defendant caused to be held a public hearing on August 13, 1962 in the State Office Building in Albany, New York, to consider the repeal of Section 221.40 of Title I of the Official Compilation of Codes, Rules and Regulations of the State of New York, pursuant to Sections 193 and 196A of the Agriculture and Markets Law, and to adopt and promulgate in place thereof the following:

> "221.40 Meat, Poultry and Fish. Meat, poultry and fish shall be sold or offered for sale as food at retail by net weight only, except that stuffed poultry, when plainly labeled as such and with the words 'including

stuffing' appearing as part of the net weight marking, may be sold or offered for sale by the net weight of the combined poultry and stuffing."

2. That the Defendant, at said time and place, through his Assistant Commissioner, permitted proof of the mailing of copies of the notice of said hearing to over one hundred persons, firms and public officials; and upon the recommendations of the defendant and the Attorney General, limited the hearing to that part of the aforesaid pro- [fol. 354] posed regulations which reads as follows:

> "221.40 Meat, Poultry and Fish. Meat, poultry and fish shall be sold or offered for sale as food at retail by net weight only."

3. That the defendant thereafter promulgated the following regulation:

> "221.40 Meat, Poultry and Fish. Meat, poultry and fish shall be sold or offered for sale as food at retail by net weight only."

4. That the following persons attended said hearing:

a. John H. Stone, Assistant Commissioner, Department of Agriculture and Markets Presiding.

b. George W. Gloning, Jr., Assistant Counsel Presiding.

c. John F. Madden, Director of Bureau of Weights and Measures, State of New York.

d. John J. Pinello, Sealer, City of Poughkeepsie, 190 Hocker Avenue, Poughkeepsie, New York.

e. Clyde J. Wensing, Sealer, Weights and Measures, 150 Liberty Street, Newburgh, New York.

f. Walter J. Still, Dutchess County Deputy Sealer, Poughkeepsie, New York.

g. James Farkas, Sealer, Rockland County, New City, New York.

5. That in the County of Orange in the State of New York, commencing in November 1962, James VanZetta, the Sealer of Weights and Measures of said County, notified actual and potential wholesale and retail customers of the plaintiffs:

a. That all future sales of stuffed turkeys in the County of Orange would be illegal unless the label on stuffed turkeys showed separately the net weight of the turkey, the net weight of the stuffing and the total net weight, and

b. That the said requirement, as a condition to the the future sale and distribution of stuffed turkeys in Orange County, represented his interpretation and application of Section 193 of the Agriculture and Markets Law and Regulation 221.40 promulgated thereunder and that the said requirement would thereafter be strictly enforced pursuant to the provisions and remedies set forth in the Agriculture and Markets Law of the State of New York.

[fol. 355] 6. That in the City of Newburgh, County of Orange, State of New York, commencing in November 1962, Clyde J. Wensing, Sealer of said City, notified actual and potential wholesale and retail customers of the plaintiffs:

a. That all future sales of stuffed turkeys in the City of Newburgh would be illegal unless the label on stuffed turkeys showed separately the net weight of the turkey, the net weight of the stuffing and the total net weight, and

b. That the said requirement, as a condition to the future sale and distribution of stuffed turkeys in the City of Newburgh, represented his interpretation and application of Section 193 of the Agriculture and Markets Law and Regulation 221.40 promulgated thereunder and that the said requirement would thereafter be strictly enforced pursuant to the provisions and remedies set forth in the Agriculture and Markets Law of the State of New York.

7. That in the County of Rockland, State of New York, commencing in November 1962, James Farkas, Sealer of said County, notified actual and potential wholesale and retail customers of the plaintiffs:

a. That all future sales of stuffed turkeys in the County of Rockland would be illegal unless the label on stuffed turkeys showed separately the net weight of the turkey, the net weight of the stuffing and the total net weight, and

b. That the said requirement, as a condition to the future sale and distribution of stuffed turkeys in the County of Rockland, represented his interpretation and application of Section 193 of the Agriculture and Markets Law and Regulation 221.40 promulgated thereunder and that the said requirement would thereafter be strictly enforced pursuant to the provisions and remedies set forth in the Agriculture and Markets Law of the State of New York.

8. That in the County of Dutchess, State of New York, commencing in November 1962, J. Edward Dean, Sealer of said County, notified actual and potential wholesale and retail customers of the plaintiffs:

a. That all future sales of stuffed turkeys in the County of Dutchess would be illegal unless the label on stuffed turkeys showed separately the net weight of the turkey, the net weight of the stuffing and the [fol. 356] total net weight, and

b. That the said requirement, as a condition to the future sale and distribution of stuffed turkeys in the County of Dutchess, represented his interpretation and application of Section 193 of the Agriculture and Markets Law and Regulation 221.40 promulgated thereunder and that the said requirement would thereafter be strictly enforced pursuant to the provisions and remedies set forth in the Agriculture and Markets Law of the State of New York.

9. That in the City of Poughkeepsie, County of Dutchess, State of New York, John J. Pinello, Sealer of said City, commencing in November 1962, notified actual and potential wholesale and retail customers of the plaintiffs:

a. That all future sales of stuffed turkeys in the City of Poughkeepsie would be illegal unless the label on stuffed turkeys showed separately the net weight of the turkey, the net weight of the stuffing and the total net weight, and

b. That the said requirement, as a condition to the future sale and distribution of stuffed turkeys in the City of Poughkeepsie, represented his interpretation and application of Section 193 of the Agriculture and Markets Law and Regulation 221.40 promulgated thereunder and that the said requirement would thereafter be strictly enforced pursuant to the provisions and remedies set forth in the Agriculture and Markets Law of the State of New York.

10. That in the County of Suffolk, State of New York, commencing in November 1962, Harwood G. Ehrhardt, Sealer of said County, notified actual and potential wholesale and retail customers of the plaintiffs:

a. That all future sales of stuffed turkeys in the County of Suffolk would be illegal unless the label on stuffed turkeys showed separately the net weight of the turkey, the net weight of the stuffing and the total net weight, and

b. That the said requirement, as a condition to the future sale and distribution of stuffed turkeys in the County of Suffolk, represented his interpretation and application of Section 193 of the Agriculture and Markets Law and Regulation 221.40 promulgated thereunder and that the said requirement would thereafter be strictly enforced pursuant to the provisions and [fol. 357] remedies set forth in the Agriculture and Markets Law of the State of New York.

11. That in the County of Nassau, State of New York, commencing in November 1962, Robert Williams, Sealer of said County, notified actual and potential wholesale and retail customers of the plaintiffs:

a. That all future sales of stuffed turkeys in the County of Nassau would be illegal unless the label on stuffed turkeys showed the net weight of the turkey, and

b. That the said requirement, as a condition to the future sale and distribution of stuffed turkeys in the County of Nassau, represented his interpretation and application of Section 193 of the Agriculture and Markets Law and Regulation 221.40 promulgated thereunder and that the said requirement would thereafter be strictly enforced pursuant to the provisions and remedies set forth in the Agriculture and Markets Law of the State of New York.

12. That on August 21, 1963, the defendant by his agent, George W. Gloning, Jr., Assistant Counsel of the Department of Agriculture and Markets, did answer an inquiry of the Land-O-Lakes Corporation, in Minneapolis, Minnesota, concerning the legality of the sale of boned and stuffed turkeys in the State of New York, which among other things, including the following:

a. That Swift & Company attempted to market stuffed poultry in the City of New York, on Long Island, and in some neighboring counties, and that the local weights and measures officials prohibited such sale and a conviction for such sales was secured in New York City.

b. That in 1963, a bill was introduced in the legislature which would have permitted the sale of combination foods or food products with a declaration of the net weight of the combination product identical with the wording of Section 32 of the Model State Law on Weights and Measures adopted by the 27th National Conference on Weights and Measures in 1962, and that both houses of the New York Legislature passed said bill and that same was vetoed by the Governor.

[fol. 358] c. That the Department of Agriculture and Markets as a result of the Governor's veto, of said legislation, assumed the position that the distribution and sale of stuffed turkeys in New York State could only be permitted if the weight declaration showed the net weight of the turkey, the net weight of the stuffing and the total weight although federal law and regulations did not permit such marking.

d. That the defendant further assumed the position that until either the regulations or their interpretations were held to be unlawful, improper or unconstitutional, such products could not be sold in the State of New York.

Dated: New York, New York
February 20, 1964

William J. Condon
Attorney for Plaintiff
Swift & Company, Inc.
19 West 44th Street
New York 36, New York

To: Louis J. Lefkowitz, Esq.
Attorney General of the
State of New York
80 Centre Street
New York 13, New York

Evans, Orr, Gourlay and Pacelli, Esq.
15 Park Row
New York 38, New York

[fol. 359]

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK,
CITY OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

Martha E. Boyle being duly sworn, deposes and says that she is employed by the attorney for the above named plaintiff herein. That on the 20th day of February 1964 she served the within request for admissions upon Evans, Orr, Gourlay and Pacelli the attorneys for the above named plaintiff Armour by depositing a true copy of the same securely enclosed in a post-paid wrapper in the ~~Post Office — a Branch Post Office Station Sub Station Finance Station Letter Box~~—Mail Chute—Official Depository maintained and exclusively controlled by the United States at 19 West 44th Street, New York 36, New York directed to said attorneys for the plaintiff Armour at No. 15 Park Row, New York 38 N. Y., that being the address within the State designated by them for that purpose upon the preceding papers in this action, or the place where they then kept an office between which places there then was and now is a regular communication by mail.

Deponent is over the age of 19 years.

/s/ MARTHA E. BOYLE

Sworn to before me this 20th
day of February, 1964

/s/ WILLIAM J. COLAVITO

[fol. 360]

Service of a copy of the within is hereby admitted.

Dated, N. Y., Feb. 21, 1964

LOUIS J. LEFKOWITZ
Attorney for Defendant

[fol. 361]

PLAINTIFFS' EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
63 Civil 3085

SWIFT & COMPANY, and ARMOUR & COMPANY,
Plaintiffs,
vs.
DONALD J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,
Defendants.

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80 Centre Street
New York, New York.

December 19, 1963
2:15 P.M.

DEPOSITION OF JOHN F. MADDEN

APPEARANCES:

WILLIAM J. CONDON, ESQ.,
Attorney for Plaintiff Swift & Company,
19 West 44th Street
New York 36, New York.

LOUIS J. LEFKOWITZ, ESQ.,
Attorney General of the State of New York,
80 Centre Street
New York, New York.
BY: PHILLIP KAHANER, ESQ., Assistant Attorney General and
LESTER ESTERMAN, ESQ.,
of Counsel

[fol. 362] IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto, that the sealing, certification and filing of the within deposition shall be and the same are hereby waived; that such deposition may be signed and sworn to before any officer authorized to administer an oath, with the same force and effect as if signed and sworn to before the Court.

IT IS FURTHER STIPULATED AND AGREED that all objections, except as to form, are reserved to the time of trial.

IT IS FURTHER STIPULATED AND AGREED that a copy of the within deposition shall be furnished to attorney for Defendant, without cost.

WILLIAM J. CONDON
Attorney for Swift & Company, Inc.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
By: LESTER ESTERMAN
Assistant Attorney General

JOHN F. MADDEN, having been first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Condon:

Q. For the record, will you state your name?
A. John F. Madden. Director of the Bureau of Weights and Measures of the Department of Agriculture and Markets of the State of New York, with offices in Albany, New York.
[fol. 363] Q. Mr. Madden, you appear here today in response to the Notice sent by Swift & Company to take the testimony of the Defendant, Donald Wickham?
A. I do.
Q. In this position of yours as Director of Weights and Measures for the State of New York, do you act as an agent for the Commissioner of Agriculture and Markets?

A. That's correct.

Q. The powers that you exercise are derived from the powers granted to him by law, is that correct?

A. That's correct.

Q. Are you familiar with the problem which is the subject matter of this lawsuit, Swift & Company, et al., against Wickham?

A. Yes, I am. Yes.

Are you referring to the turkey, stuffed turkey problem?

Q. That's correct.

A. That's correct.

Mr. Condon: I will offer this Notice to be marked for identification.

(Whereupon, Notice of Examination Before Trial, received and marked Plaintiff's Exhibit 1 for Identification, as of this date.)

Q. Mr. Madden, what are your responsibilities in your [fol. 364] job?

A. My responsibility is to see to it that the Agriculture and Markets Law relative to the provisions of weights and measures are enforced in the State of New York, in that all consumers receive for which they pay.

Q. Do you have in this capacity jurisdiction over local, city and county sealers of weights and measures in the State of New York?

A. Supervisory powers only.

Q. What do those supervisory powers entail?

A. To instruct the weights and measures officials of Rules and Regulations of the law and any directive that the Commissioner may want to send to them. All cities and county weights and measures officials.

Q. Do you also have weights and measures inspectors working directly for you?

A. Yes. The State Bureau has five State Inspectors and one Senior Inspector.

Q. What are their responsibilities? What are their duties?

A. To carry out the directives of the Director of the Bureau of Weights and Measures.

Q. In performing this function, do they make direct inspections themselves?

A. They more or less make spot-check inspections of the [fol. 365] work accomplished by county and city weights and measures officials.

Q. Do you or they have any authority to enforce the law?

A. Oh, yes. They do.

Q. They do?

A. Yes.

Q. So that I will be clear on this: They have authority to cite violators of the law for infractions directly?

A. They have authority to cite at my direction; whenever they find irregularities they submit the reports to me and then I pass on it after reviewing it.

Q. How long have you been in weights and measures work?

A. Since 1942.

Q. Will you tell me, sir, what do you understand the law of New York to be with respect to the requirements for marking net weight on packages of frozen stuffed turkey?

A. The law—

Mr. Kahaner: This is just a suggestion. Let's see what the law is. If you want the law or regulation and then his understanding of this. In other words, do you want him to cite the statute or his understanding of the statute? Do you particularly want to put that in the record?

Mr. Condon: Well, if you think it is necessary to put it in the record. It is in the Complaint.

[fol. 366] Mr. Kahaner: I just don't want to get into any ambiguity of what we are talking about, the statute or Regulation or what. And this particular statute with reference to poultry, meats and net weight so that we identify what we are talking about.

Mr. Condon: All right. I will withdraw that question and I will ask this:

By Mr. Condon:

Q. What section of the Agriculture and Markets Law, Mr. Madden, governs the net weight marking on frozen stuffed turkey?

A. Section 193 of the Agriculture and Markets Law.

Q. Is there a supplementary Regulation of the Department of Agriculture and Markets which governs the same subject?

A. Yes. This Rule and Regulation supplements the law.

Q. What Regulation is that, sir?

A. 221.40.

Mr. Kahaner: Do you want to check? You can refresh your recollection.

The Witness: Yes, Section 221.40.

Q. Do you have with you, sir, a copy of Section 193 of the Agriculture and Markets Law?

A. Yes, I have. Right here.

Q. Will you read into the record that Section insofar as it is applicable to this inquiry?

[fol. 367] A. "Method of Sale of Food and Food Products."

By the way, this is Section 193 of the Agriculture and Markets Law.

"Method of Sale of Food and Food Products.

"1: Definition of food and food products.

"The term food and food products as used in this Section shall include all material, solid, liquid or mixed, whether simple or compound, used or intended for consumption by human beings or domestic animals normally kept as household pets and shall also include all substance or ingredients to be added thereto for any purpose.

"2: All food and food products which are sold, offered, or exposed for sale by wholesalers, packers, distributors or jobbers shall be sold or offered for sale by net weight, numerical count or standard measure, whichever term shall be applicable and shall be plainly marked by such person or persons offering the food or food products for sale, in such form or manner as may be prescribed by the Commissioner, except that it shall not be necessary to so mark meat, meat products or fish, except shellfish in natural form, provided that net weight be stated on a written invoice and on the shipping container of the meat, meat products or fish.

"3: All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under [fol. 368] such Regulations as may be prescribed by the Commissioner.

"4: All food and food products which are packaged or wrapped by the retailer in advance of being exposed or offered for sale by the retailer shall be accurately marked in such form or manner as may be prescribed by the Commissioner, with:

"A: The net weight or standard measure or numerical count.

"B: The selling price per pound or unit of standard measure, and

"C: The total selling price."

I think that is—or do you want me to read the whole Section? Two more paragraphs.

Q. I don't want it if it is not applicable to this.

A. It is not applicable.

Q. Do you have with you a copy of Regulation 221.40?

A. Yes, I do.

Q. Would you read that into the record for us, please?

A. "Section 221.40. Meat, Poultry and fish.

"Meat, Poultry and Fish, except shellfish, shall be sold or offered for sale as food at retail by net weight only."

Q. Now, Mr. Madden, I will ask you first generally, what do you understand the requirements of the New York Law to be with respect to the net weight marking on frozen stuffed turkeys?

[fol. 369] A. The law requires—the law that I just read requires the marking of the weight of the turkey and the total weight. But it would be more informative to the consumer, of course, if the three weights were there, which would include the weight of the dressing.

Q. Now, do you derive this from the statute, Section 193?

A. Yes.

Q. This is the way Section 193 is interpreted by your Department?

A. This is right.

Q. So that I will understand you correctly: You interpret that to require a separate weight statement of the weight of the turkey and the weight of the whole combination?

A. Right.

Q. You don't require a separate weight for the stuffing?

A. No. This is right.

Q. Have you had occasion to advise local city or county sealers of this requirement of the law?

A. I know one occasion.

Q. How did that occasion arise?

A. I was requested by a local city weights and measures official for a ruling on a sale of stuffed turkey.

Q. Did you give him a ruling in writing?

A. Yes, I did.

[fol. 370] Q. Do you have a copy of that ruling with you?

A. Yes, I do.

Q. May I see it?

A. Yes. Here it is.

(Document handed to counsel by the witness.)

Mr. Condon: Mr. Madden has handed me a copy of a letter dated October 10, 1963, addressed to Mr. J. Edward Dean, Sealer of Weights and Measures, 47 Fuller Lane, Hyde Park, New York, and I ask it be marked for identification.

(Whereupon, letter dated October 10, 1963, addressed to Mr. J. Edward Dean, 47 Fuller Lane, Hyde Park, New York, received and marked Plaintiff's Exhibit 2 for Identification, as of this date.)

Q. Have you had occasion, Mr. Madden, to advise with respect to the requirements of Section 193 as they apply to frozen stuffed poultry?

A. Not recently.

Q. Well, how recently?

A. Oh, I think it was two years ago.

Q. Can you tell us what that inquiry was?

A. Well, it was by telephone and I forget the parties involved at all. In fact, I think, if my memory is correct, I think it was Armour & Company who called me and asked me relative—asked me what was required as to the [fol. 371] sale of stuffed turkeys and my reply was similar to this statement.

Q. This was orally?

A. Orally, by telephone, yes.

Q. Have you had any inquiries from local Sealers, orally, other than this one from Mr. Dean?

A. Not recently. Around a year ago, a year and a half ago, I think.

Q. Can you recall the circumstances?

A. Not really. They just discussed the sale of stuffed turkeys, not really asking me any opinion.

Anything—I do know this: Anything they asked me I would ask them to send to me the request in writing so I could give them a ruling and this is the only one that I have received.

Mr. Kahaner: When you say "This," are you referring to Plaintiff's Exhibit 2 for Identification?

The Witness: Yes, that's right.

Q. Incidentally, Mr. Dean is the Sealer of Weights and Measures of what jurisdiction?

A. Dutchess County.

Q. Are you familiar with the local law, Mr. Madden, which was recently passed by the City Council of the City of New York and signed on Friday of last week by the Mayor, on this subject?

A. No, I am not familiar with that.

Q. Are you aware, Mr. Madden, of any New York State processors of stuffed turkey?

[fol. 372] A. No, I am not.

Q. You have never had any inquiry from any such?

A. Not from New York State. No, sir.

Q. Or from any local Sealer of Weights and Measures with respect to local processors of stuffed turkey?

A. No, sir.

Q. Did you ever see, Mr. Madden, any publicity releases sent out by any local Sealers of Weights and Measures or people standing in their position? I am referring now to whatever position the Commissioner of Markets of the City of New York has in this regard, with respect to advice to the consuming public not to buy stuffed turkeys unless marked in accordance with your requirements as you have laid them out here?

A. I haven't seen articles of publicity, but I have heard about them.

Q. Insofar as you heard about them, did they agree with your interpretation of the law? If you know, sir.

A. I have set forth my interpretation of the law and this is what I follow.

Q. When you say that, you refer to what you told Mr. Dean in Plaintiff's Exhibit 2 for Identification?

A. That's right.

Q. What relationship does your Department have to the Commissioner of Markets of the City of New York with respect to weights and measures matters? I am not talking about a personal relationship, now, I mean from a legal standpoint. [fol. 373]

A. Well, the Section 180 of the Agriculture and Markets Law says that the Commissioner shall have supervisory powers over all city and county weights and measures officials. We do have investigational activity in New York infrequently, not too often, but the Bureau of Weights and Measures here in New York conducts their own inspections under the Commissioner of Markets.

Mr. Kahaner: City Commissioner?

The Witness: Yes, that's right.

Q. Do you exercise under the law the same supervisory and— Did you say advisory, before? I don't want to put words in your mouth.

A. Investigative powers.

Q. The same functions with respect to the weights and measures functions of the Department of Markets of the City of New York as you do city and county sealers throughout the rest of the State?

A. Well, as I said before, we have exercised investigation powers and investigate cases in New York upon complaint. Not on a voluntary basis, but because of the complaint we have come to the city and make an investigation of certain complaints.

As I said before, the Bureau of Weights and Measures of the City does its own inspections, but they follow the State Law.

Q. I don't want to belabor this, but I am making a dis- [fol. 374] tinction, Mr. Madden, between the practice which you follow and the authority which you have, and I ask you not with respect to your practice, but rather with respect to your authority: Do you have the same supervisory authority over the activities of weights and measures in the City of New York as you do throughout the rest of the State?

A. It's my opinion that we have.

Q. Have you had occasion, Mr. Madden, to discuss this matter of weight marking of frozen stuffed turkeys with any representatives of the United States Department of Agriculture?

A. No, I have not.

Q. Have you had occasion to discuss it with representatives of other state governments?

A. Yes, both by letter and orally.

Q. Are you aware, sir, of any other state which requires separate marking of the turkey in a frozen stuffed turkey?

Mr. Kahaner: Objection.

I don't think that has any materiality, what other states may or may not have. We are talking about the law in New York State and I don't think that any—that has any relevance to the question.

Q. Do you want to answer?

The Witness: Shall I answer it?

Mr. Kahaner: I don't think we ought to. It is a question that—

[fol. 375] Off the record.

(Discussion off the record.)

Mr. Condon: I will withdraw the question.

I have no further questions.

Mr. Kahaner: I think that is about all.

(Whereupon, proceedings were concluded.)

/s/ JOHN F. MADDEN
John F. Madden

Subscribed and sworn to before me
this 4th day of February 1964.

/s/ ELSIE V. HOLMES
Notary Public

Elsie V. Holmes
Notary Public, State of New York
Residing in Albany County
Official Number 1807
My Commission expires March 30, 1964

[fol. 376]

PLAINTIFF'S EXHIBIT 1 TO DEPOSITION

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,
Plaintiffs,
—against—
DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,
Defendant.

NOTICE TO TAKE DEPOSITION UPON ORAL EXAMINATION

SIRS:

PLEASE TAKE NOTICE that the plaintiff SWIFT & COMPANY, INC. in the above entitled action will take the deposition of the defendant DON J. WICKHAM upon oral examination, pursuant to the Federal Rules of Civil Procedure at the Office of the Attorney General of the State of New York at 80 Centre Street, New York 13, N. Y. on the 4th floor, on the 19th day of December, 1963, at 2 o'clock P.M., before a Notary Public or before some other officer, authorized by law to take depositions. The oral examination will continue from day-to-day until completed. You are invited to attend and cross-examine.

Dated: New York, N. Y.
December 10, 1963

WILLIAM J. CONDON
Attorney for Plaintiff
Swift & Company, Inc.
19 West 44th Street
New York 36, New York

To: Louis J. Lefkowitz, Esq.
Attorney General of the
State of New York
80 Centre Street
New York 13, New York

Evans, Orr, Gourlay and
Pacelli, Esqs.
15 Park Row
New York 38, New York

[fol. 377]

PLAINTIFF'S EXHIBIT 2 TO DEPOSITION

October 10, 1963

Mr. J. Edward Dean
Scaler of Weights and Measures
47 Fuller Lane
Hyde Park, New York

Dear Ed:

Receipt of your letter of October 7, 1963, is acknowledged.

Section 221.40 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York provides as follows:

> "221.40 Meat, poultry and fish. Meat, poultry and fish, except shellfish, shall be sold or offered for sale as food by retail at net weight only."

In accordance with the rules and regulations, the sale of stuffed poultry is lawful, only if the net weight of the poultry, in addition to the net weight of the total combination product, is stated on the label.

Cordially yours,

John F. Madden
Director

JFM:JM

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PLAINTIFFS' EXHIBIT 5

(See opposite) ☞

FORM PY-132
(4-12-61) (4-12-61)

FORM APPROVED
BUDGET BUREAU NO. 40-R3072.1

U. S. DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
POULTRY DIVISION
WASHINGTON 25, D. C.

APPLICATION FOR LABEL APPROVAL

FOR USE BY USDA

TEMPORARY APPROVAL
MAY 16 1962
By E. Willi
AGRICULTURAL MARKETING SERVICE
U. S. DEPT. of AGRICULTURE

CODE NO.	LABEL NO.
140-3-2	51279

NAME AND ADDRESS OF APPLICANT *(Street and No., City, and State)*

Swift & Company
913 McKinley Avenue
Detroit Lakes, Minnesota

INSTRUCTIONS TO APPLICANT: Use this form when submitting each label for approval or comment. Review the checklist on the reverse of this form to assure that you are furnishing all the required information. The USDA can act promptly on your application only if all this information is included. Mail 3 labels and 3 completed copies of this form to the address shown in the heading.

DESCRIPTION OF LABEL SUBMITTED AND ACTION REQUESTED

1. TYPE OF LABEL *(Check one)*

☐ Finished label ready for use ☐ Unfinished label, not in final form

2. HOW LABEL WILL BE USED *(Check one)*

☐ On shipping container ☐ On immediate container ☐ Other *(Describe)*___

3. ACTION REQUESTED OF USDA

☐ Final approval
☐ Review and comment ☐ Temporary approval for _____ days to deplete inven

4. IF LABEL BEING SUBMITTED HAS BEEN COMMENTED ON PREVIOUSLY BY USDA, GI

PLANT NO.	DATE OF APPLICATION	SIGNATURE OF
P- 576		➔

APPROVAL
TERMINATES
11/1/62

SPACE BELOW FOR ACTION BY USDA

☐ SATISFACTORY TO PRINT *(If modification is necessary, it will be noted bel*
FOR FORMAL APPROVAL.

☐ THIS NOTICE SHALL BE ATTACHED TO AND BECOME A PART OF PRIOR LABEL APPROVAL NO. ________

☐ LABEL APPROVED – *Provided that:*

- ☐ The label is for use with other approved labeling bearing all mandatory information.
- ☐ The vignette accurately depicts the contents of the package.
- ☐ Name of product will be checked or stamped in space provided on each label.
- ☐ Plant number insert is placed in each package and is clearly legible.
- ☐ Metal clip with P-______ embossed thereon *(Label approval No.* ________*)* is used as bag closure and identification of plant of origin.

☐ APPROVAL EXTENDED TO COVER SIMILAR LABELS FOR: ________

Temporary approval is issued until November 1, 1962.

The ingredient statement should not be at right angles to the other mandatory information.

cc: Inspector-in-Charge
Swift & Co., Gen. Off., Chicago, Ill.

Any approval of or comment concerning this labeling material or the wording thereon as contained in this Notice must be understood to represent the attitude of this Service only, and does not excuse failure to comply with other applicable Federal or State laws, or city or municipal regulations.

FORM PY-132 (REVERSE)

Review the information shown on the label you are submitting against the checklist below. Doing so will help you to make sure that your label has all the information needed for consideration by USDA.

CHECKLIST

1. NAME OF PRODUCT

The common or usual name of the product is shown on the label.

2. NAME AND ADDRESS OF PACKER

The name and address of processor or distributor are shown on the label.

3. NET WEIGHT OF PRODUCT

The net weight of the product is shown on label *IN POUNDS AND OUNCES*, the appropriate fluid measurement is shown, or space is designated for showing this information.

4. INSPECTION MARK OR GRADE SHIELD

a. The inspection mark indicates that the product is inspected only; or

b. The letter grade on individually marked birds or the grade shield and inspection mark indicate that the product is inspected and Federally graded.

5. PLANT NUMBER

The method of indicating the plant number is shown.

6. EXTENSION OF LABEL APPROVAL

If the label approval is to be extended to various net weights, parts or classes of poultry, or to rubber stamp imprints designating applicable variations, triplicate copies of additional information are included with this application.

7. EXCLUSION OF GIBLETS

If label is for READY-TO-COOK BIRD(S) *(whole carcass or complete cut-up carcass)*, and giblets are NOT included, the fact that they are omitted is indicated on the label.

8. POULTRY FOOD PRODUCTS WITH FORMULA

a. If label is for a POULTRY FOOD PRODUCT WITH A FORMULA, the product formula, including the composition of all spices and flavorings used therein, together with a brief statement of the manufacturing process used, are included in triplicate on separate sheets attached to this application; and

b. If label is for a POULTRY FOOD PRODUCT WITH A FORMULA, the ingredient statement on the label lists each component in order of decreasing proportion, and components of mixtures *(batters, breadings, bases, stocks, broths, spice mixtures, etc.)* are separately listed following the name of the mixture.

NOTE: *True spices may be designated "spice," and powdered vegetable and spice extracts may be listed as "flavoring."*

FORM PY-132
(4-12-61)

FORM APPROVED
BUDGET BUREAU NO. 40-R3072.1

U. S. DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
POULTRY DIVISION
WASHINGTON 25, D. C.

APPLICATION FOR LABEL APPROVAL

FOR USE BY USDA

TEMPORARY APPROVAL
MAY 16 1962
By E. Willie
AGRICULTURAL MARKETING SERVICE
U. S. DEPT. of AGRICULTURE

CODE NO.	LABEL NO.
140-T-2	51979

NAME AND ADDRESS OF APPLICANT *(Street and No., City, and State)*

Swift & Company
Poultry Plant
Detroit Lakes, Minn.

INSTRUCTIONS TO APPLICANT: Use this form when submitting each label for approval or comment. Review the checklist on the reverse of this form to assure that you are furnishing all the required information. The USDA can act promptly on your application only if all this information is included. Mail 3 labels and 3 completed copies of this form to the address shown in the heading.

DESCRIPTION OF LABEL SUBMITTED AND ACTION REQUESTED

1. TYPE OF LABEL *(Check one)*
   ☒ Finished label ready for use ☐ Unfinished label, not in final form
2. HOW LABEL WILL BE USED *(Check one)*
   ☐ On shipping container ☐ On immediate container ☒ Other *(Describe)* Bag for Stuffed turkey with clip bearing plant number Giblets are wrapped in ~~plain foil and placed~~ on back of bird.
3. ACTION REQUESTED OF USDA
   ☐ Final approval
   ☐ Review and comment ☒ Temporary approval for 180
4. IF LABEL BEING SUBMITTED HAS BEEN COMMENTED ON PREVIOUSLY BY USDA, GIVE COMMENT DATE

We had previously temporary approval #5061 expiring 12/31/61. You commented*

PLANT NO.	DATE OF APPLICATION	
P-576	5/8/62	

SPACE BELOW FOR ACTION BY USDA

☐ SATISFACTORY TO PRINT *(If modification is necessary, it will be noted below in "Remarks")*. SUBMIT 3 FINISHED LABELS FOR FORMAL APPROVAL.

☐ THIS NOTICE SHALL BE ATTACHED TO AND BECOME A PART OF PRIOR LABEL APPROVAL NO. ____________

☐ LABEL APPROVED – *Provided that:*
- ☐ The label is for use with other approved labeling bearing all mandatory information.
- ☐ The vignette accurately depicts the contents of the package.
- ☐ Name of product will be checked or stamped in space provided on each label.
- ☐ Plant number insert is placed in each package and is clearly legible.
- ☐ Metal clip with P-______ embossed thereon *(Label approval No. ____________)* is used as bag closure and identification of plant of origin.

☐ APPROVAL EXTENDED TO COVER SIMILAR LABELS FOR: ____________

~~[illegible]~~

*on 4/10/62 that this approval had expired and "been withdrawn from our files. Submit labels in triplicate," etc.

Formula as previously approved is attached.

[fol. 380]

Any approval of or comment concerning this labeling material or the wording thereon as contained in this Notice must be understood to represent the attitude of this Service only, and does not excuse failure to comply with other applicable Federal or State laws, or city or municipal regulations.

Review the information shown on the label you are submitting against the checklist below. Doing so will help you to make sure that your label has all the information needed for consideration by USDA.

CHECKLIST

1. NAME OF PRODUCT

The common or usual name of the product is shown on the label.

2. NAME AND ADDRESS OF PACKER

The name and address of processor or distributor are shown on the label.

3. NET WEIGHT OF PRODUCT

The net weight of the product is shown on label *IN POUNDS AND OUNCES*, the appropriate fluid measurement is shown, or space is designated for showing this information.

4. INSPECTION MARK OR GRADE SHIELD

a. The inspection mark indicates that the product is inspected only; or

b. The letter grade on individually marked birds or the grade shield and inspection mark indicate that the product is inspected and Federally graded.

5. PLANT NUMBER

The method of indicating the plant number is shown.

6. EXTENSION OF LABEL APPROVAL

If the label approval is to be extended to various net weights, parts or classes of poultry, or to rubber stamp imprints designating applicable variations, triplicate copies of additional information are included with this application.

7. EXCLUSION OF GIBLETS

If label is for READY-TO-COOK BIRD(S) *(whole carcass or complete cut-up carcass)*, and giblets are NOT included, the fact that they are omitted is indicated on the label.

8. POULTRY FOOD PRODUCTS WITH FORMULA

a. If label is for a POULTRY FOOD PRODUCT WITH A FORMULA, the product formula, including the composition of all spices and flavorings used therein, together with a brief statement of the manufacturing process used, are included in triplicate on separate sheets attached to this application; and

b. If label is for a POULTRY FOOD PRODUCT WITH A FORMULA, the ingredient statement on the label lists each component in order of decreasing proportion, and components of mixtures *(batters, breadings, bases, stocks, broths, spice mixtures, etc.)* are separately listed following the name of the mixture.

NOTE: *True spices may be designated "spice," and powdered vegetable and spice extracts may be listed as "flavoring."*

[fol. 382]

STUFFED TURKEY

Formula

White bread stuffiing:

Ingredients	Per Cent	
White bread croutons	69.4%	
XXX Vream	23.2%	
Salt	2.6%	
Onion Powder	2.2%	
Celery Stock Granules	1.7%	
Mixed Spices	.9%	(79% sage, 12% thyme, 9% pepper)
Total	100.00%	

Method of Manufacture

Mix 57% dry mix and 43% water. The water to be added at the stuffing machine. In mixing add shortening first while agitating then add salt, onion powder, celery stock granules and spices while agitating. Do the mixing as follows:

> Add melted Vream to bread croutons in mixer while mixer is operating. Pour in slowly over croutons and mix for about 3 minutes; then add sterilized spices, mix 5 minutes. Avoid overmixing to the extent that the croutons will be broken down. Water will be added to the dried dressing automatically at the stuffing machine.

Stuffing Operations

Mix stuffing at temperature not to exceed 40° handling in stainless steel trucks, removing stuffing from truck with stainless steel scoops. Stuffing must not be handled with hand.

Water will be added through a connection at a sugar and' arrangements should be made to pre-chill the water to stay within the 40° maximum temperature.

The amount of stuffing will vary depending on size and conformation of turkey.

Usual range is:

6# to 8# stuffed weight—25 to 35% of the weight of the turkey without giblets before stuffing—

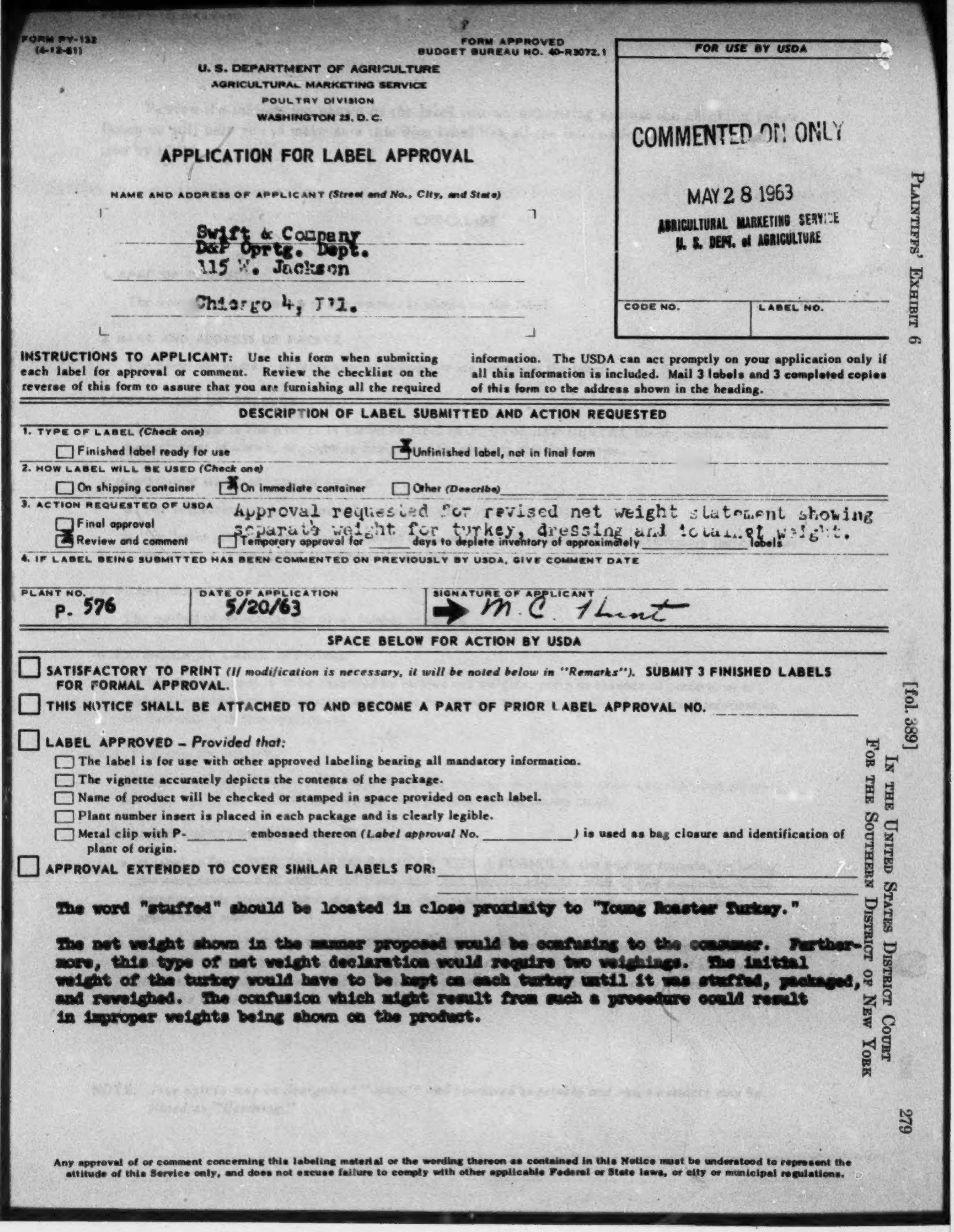
Over 8#—16 to 25%

[fol. 383] Operators handling turkeys and/or stuffing shall wear surgical rubber gloves. These are to be sterilized continuously during the operation in 50 PPM chlorine. By passing hands under water spray each time after patting stuffing into cavity and before dipping hands in chlorine.

Nylon brush used for brushing off particles of dressing shall also be passed under water spray each time before dipping in chlorine. Chlorine shall be changed in all crocks each hour or more frequently if necessary.

Extend approval to similar label for small-grown.

Plaintiffs' Exhibit 6



FORM PY-132
(4-12-61)

FORM APPROVED
BUDGET BUREAU NO. 40-R3072.1

U. S. DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
POULTRY DIVISION
WASHINGTON 25, D. C.

APPLICATION FOR LABEL APPROVAL

FOR USE BY USDA

COMMENTED ON ONLY
MAY 28 1963
AGRICULTURAL MARKETING SERVICE
U. S. DEPT. of AGRICULTURE

CODE NO.

LABEL NO.

NAME AND ADDRESS OF APPLICANT *(Street and No., City, and State)*

Swift & Company
D&P Oprtg. Dept.
115 W. Jackson
Chicago 4, Ill.

INSTRUCTIONS TO APPLICANT: Use this form when submitting each label for approval or comment. Review the checklist on the reverse of this form to assure that you are furnishing all the required information. The USDA can act promptly on your application only if all this information is included. Mail 3 labels and 3 completed copies of this form to the address shown in the heading.

DESCRIPTION OF LABEL SUBMITTED AND ACTION REQUESTED

1. TYPE OF LABEL *(Check one)*
☐ Finished label ready for use ☒ Unfinished label, not in final form

2. HOW LABEL WILL BE USED *(Check one)*
☐ On shipping container ☒ On immediate container ☐ Other *(Describe)*

3. ACTION REQUESTED OF USDA
☐ Final approval
☒ Review and comment
☐ Temporary approval for ______ days to deplete inventory of approximately ______ labels

Approval requested for revised net weight statement showing separate weight for turkey, dressing and total net weight.

4. IF LABEL BEING SUBMITTED HAS BEEN COMMENTED ON PREVIOUSLY BY USDA, GIVE COMMENT DATE

PLANT NO. P. 576	DATE OF APPLICATION 5/20/63	SIGNATURE OF APPLICANT M. C. Hunt

SPACE BELOW FOR ACTION BY USDA

☐ SATISFACTORY TO PRINT *(If modification is necessary, it will be noted below in "Remarks").* SUBMIT 3 FINISHED LABELS FOR FORMAL APPROVAL.

☐ THIS NOTICE SHALL BE ATTACHED TO AND BECOME A PART OF PRIOR LABEL APPROVAL NO. ______

☐ LABEL APPROVED – *Provided that:*
- ☐ The label is for use with other approved labeling bearing all mandatory information.
- ☐ The vignette accurately depicts the contents of the package.
- ☐ Name of product will be checked or stamped in space provided on each label.
- ☐ Plant number insert is placed in each package and is clearly legible.
- ☐ Metal clip with P-______ embossed thereon *(Label approval No.* ______*)* is used as bag closure and identification of plant of origin.

☐ APPROVAL EXTENDED TO COVER SIMILAR LABELS FOR: ______

The word "stuffed" should be located in close proximity to "Young Roaster Turkey."

The net weight shown in the manner proposed would be confusing to the consumer. Furthermore, this type of net weight declaration would require two weighings. The initial weight of the turkey would have to be kept on each turkey until it was stuffed, packaged, and reweighed. The confusion which might result from such a procedure could result in improper weights being shown on the product.

Any approval of or comment concerning this labeling material or the wording thereon as contained in this Notice must be understood to represent the attitude of this Service only, and does not excuse failure to comply with other applicable Federal or State laws, or city or municipal regulations.

FORM PY-132 (REVERSE)

Review the information shown on the label you are submitting against the checklist below. Doing so will help you to make sure that your label has all the information needed for consideration by USDA.

CHECKLIST

1. NAME OF PRODUCT

The common or usual name of the product is shown on the label.

2. NAME AND ADDRESS OF PACKER

The name and address of processor or distributor are shown on the label.

3. NET WEIGHT OF PRODUCT

The net weight of the product is shown on label *IN POUNDS AND OUNCES*, the appropriate fluid measurement is shown, or space is designated for showing this information.

4. INSPECTION MARK OR GRADE SHIELD

a. The inspection mark indicates that the product is inspected only; or

b. The letter grade on individually marked birds or the grade shield and inspection mark indicate that the product is inspected and Federally graded.

5. PLANT NUMBER

The method of indicating the plant number is shown.

6. EXTENSION OF LABEL APPROVAL

If the label approval is to be extended to various net weights, parts or classes of poultry, or to rubber stamp imprints designating applicable variations, triplicate copies of additional information are included with this application.

7. EXCLUSION OF GIBLETS

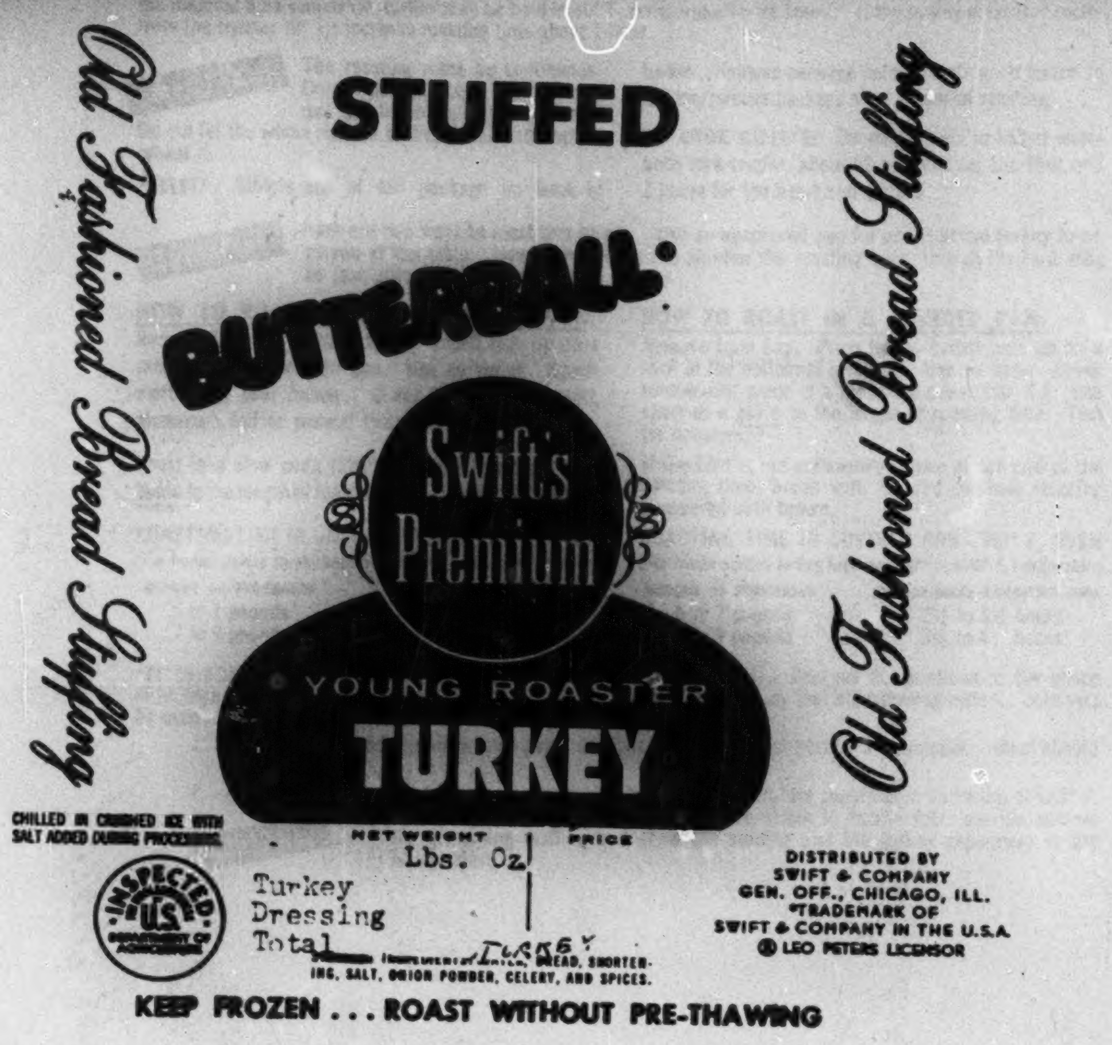
If label is for READY-TO-COOK BIRD(S) *(whole carcass or complete cut-up carcass)*, and giblets are NOT included, the fact that they are omitted is indicated on the label.

8. POULTRY FOOD PRODUCTS WITH FORMULA

a. If label is for a POULTRY FOOD PRODUCT WITH A FORMULA, the product formula, including the composition of all spices and flavorings used therein, together with a brief statement of the manufacturing process used, are included in triplicate on separate sheets attached to this application; and

b. If label is for a POULTRY FOOD PRODUCT WITH A FORMULA, the ingredient statement on the label lists each component in order of decreasing proportion, and components of mixtures *(batters, breadings, bases, stocks, broths, spice mixtures, etc.)* are separately listed following the name of the mixture.

NOTE: *True spices may be designated "spice," and powdered vegetable and spice extracts may be listed as "flavoring."*



Old Fashioned Bread Stuffing

STUFFED

BUTTERBALL®

Swift's Premium

YOUNG ROASTER

TURKEY

Old Fashioned Bread Stuffing

CHILLED IN CRUSHED ICE WITH
SALT ADDED DURING PROCESSING.

INSPECTED U.S. DEPARTMENT OF AGRICULTURE

NET WEIGHT	PRICE
Lbs. Oz.	
Turkey	
Dressing	
Total	

[illegible] INGREDIENTS: TURKEY, BREAD, SHORTENING, SALT, ONION POWDER, CELERY, AND SPICES.

DISTRIBUTED BY
SWIFT & COMPANY
GEN. OFF., CHICAGO, ILL.
®TRADEMARK OF
SWIFT & COMPANY IN THE U.S.A.
Ⓡ LEO PETERS LICENSOR

KEEP FROZEN . . . ROAST WITHOUT PRE-THAWING

Martha Logan suggests:

Stuffed turkey should be kept frozen until ready to roast. For storage longer than one week, keep at 0° F. Roasting time shown below is for a frozen turkey kept overnight (12 to 18 hours) in a 40° F. refrigerator. To reduce the roasting time somewhat, turkey may be held in 40° F. refrigerator for 48 hours. If the turkey is taken directly from the freezer (0° F.) increase roasting time about 1 hour.

IMPORTANT The roasting must be continuous. Do not partially cook the bird one day and finish cooking it the next. Do not let the whole roasted bird cool, then attempt to reheat it.

GIBLETS: Giblets are in foil package on back of turkey. Remove package before roasting. If frozen to turkey, remove package after 1 hour of roasting.

TO COOK GIBLETS: Simmer giblets in salted water until fork-tender, about 20 minutes for the liver and 2 hours for the heart and gizzard.

TO ROAST Here are two ways to roast this turkey. Use an uncovered pan for an attractive turkey to be carved at the table. Use a covered pan to shorten the roasting time, though the bird may be less attractive if cooked by this method.

HOW TO ROAST IN AN UNCOVERED PAN:

Remove from bag. Place turkey breast side up on a rack in a shallow open pan. Use no water. Spoon melted fat over turkey. Cover turkey lightly with aluminum foil or several thicknesses of cheesecloth.

Roast in a slow oven (325° F.). Use this chart as a guide to the length of roasting time. Test for doneness.*

ROASTING TIME IN UNCOVERED PAN—325° F. OVEN
(For frozen stuffed turkey kept overnight in a 40° F. refrigerator.)

WEIGHT AS PURCHASED	APPROXIMATE ROASTING TIME
5 to 7 pounds	4½ to 6 hours
7 to 9 pounds	6 to 6¾ hours

HOW TO ROAST IN A COVERED PAN:

Remove from bag. Place turkey breast side up on a rack in the bottom of a roaster. Use no water. Cover roaster and place in a moderate oven (350° F.). Use chart as a guide to the length of roasting time. Test for doneness.*

If the bird is not sufficiently brown at the end of the roasting time, brush with fat and continue roasting uncovered until brown.

ROASTING TIME IN COVERED PAN—350° F. OVEN
(For frozen stuffed turkey kept overnight in a 40° F. refrigerator.)

WEIGHT AS PURCHASED	APPROXIMATE ROASTING TIME
5 to 7 pounds	2½ to 3¼ hours
7 to 9 pounds	3¼ to 4 hours

***TESTS FOR DONENESS:** The roasting times are given as a guide only. Because of variations in the shape of turkeys and variations in the performance of different ovens, it is necessary that the following tests for doneness be used:

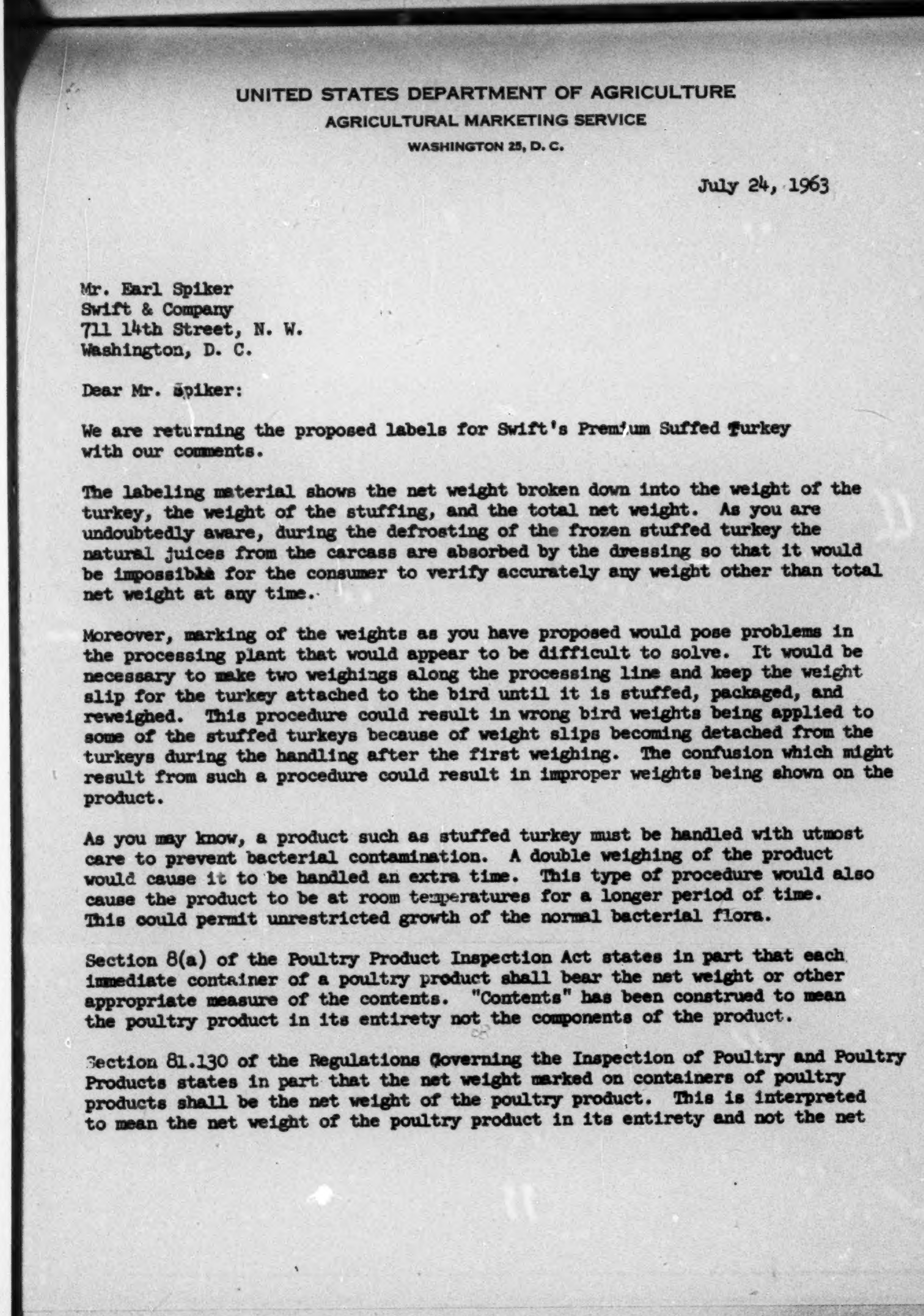
1. Protect thumb and forefinger with paper or cloth. Pinch thickest portion of drumstick. Meat should feel very soft.
2. Insert roast meat thermometer into center of stuffing. Temperature should be a minimum of 165° F.

TO STORE When the turkey has been roasted, serve within ½ hour. After service, remove the remaining stuffing and store the stuffing and the turkey separately in the refrigerator.

PLAINTIFFS' EXHIBIT 7

[fol. 393]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
WASHINGTON 25, D. C.

July 24, 1963

Mr. Earl Spiker
Swift & Company
711 14th Street, N. W.
Washington, D. C.

Dear Mr. Spiker:

We are returning the proposed labels for Swift's Premium Suffed Turkey with our comments.

The labeling material shows the net weight broken down into the weight of the turkey, the weight of the stuffing, and the total net weight. As you are undoubtedly aware, during the defrosting of the frozen stuffed turkey the natural juices from the carcass are absorbed by the dressing so that it would be impossible for the consumer to verify accurately any weight other than total net weight at any time.

Moreover, marking of the weights as you have proposed would pose problems in the processing plant that would appear to be difficult to solve. It would be necessary to make two weighings along the processing line and keep the weight slip for the turkey attached to the bird until it is stuffed, packaged, and reweighed. This procedure could result in wrong bird weights being applied to some of the stuffed turkeys because of weight slips becoming detached from the turkeys during the handling after the first weighing. The confusion which might result from such a procedure could result in improper weights being shown on the product.

As you may know, a product such as stuffed turkey must be handled with utmost care to prevent bacterial contamination. A double weighing of the product would cause it to be handled an extra time. This type of procedure would also cause the product to be at room temperatures for a longer period of time. This could permit unrestricted growth of the normal bacterial flora.

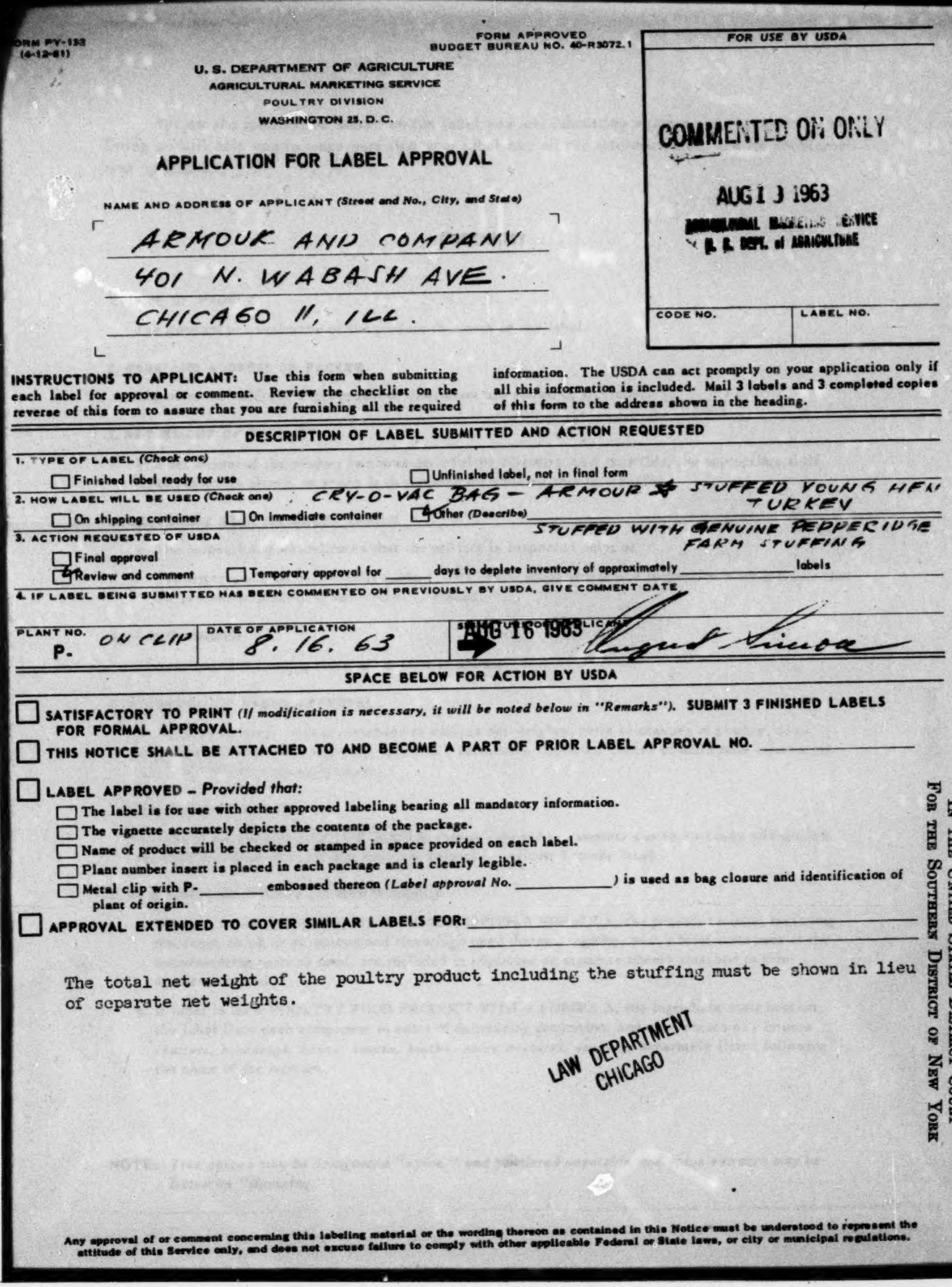
Section 8(a) of the Poultry Product Inspection Act states in part that each immediate container of a poultry product shall bear the net weight or other appropriate measure of the contents. "Contents" has been construed to mean the poultry product in its entirety not the components of the product.

Section 81.130 of the Regulations Governing the Inspection of Poultry and Poultry Products states in part that the net weight marked on containers of poultry products shall be the net weight of the poultry product. This is interpreted to mean the net weight of the poultry product in its entirety and not the net weight of any specific ingredients shall be shown on the label. Since the product is clearly labeled as stuffed turkey, the net weight of the latter must be shown.

With present methods and processing technics, it appears that operations can not be conducted at the processing plant in such a manner as to avoid possible insanitary practices and confusion resulting in incorrect weights being shown. Therefore, we are unable to approve the proposed label.

Sincerely yours,

Robert J. Lee, Head
Poultry Products Section
Inspection Branch
Poultry Division



ORM PY-133
(4-12-61)

FORM APPROVED
BUDGET BUREAU NO. 40-R3072.1

U. S. DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE
POULTRY DIVISION
WASHINGTON 25, D. C.

APPLICATION FOR LABEL APPROVAL

NAME AND ADDRESS OF APPLICANT *(Street and No., City, and State)*

ARMOUR AND COMPANY
401 N. WABASH AVE.
CHICAGO 11, ILL.

FOR USE BY USDA

COMMENTED ON ONLY
AUG 19 1963
AGRICULTURAL MARKETING SERVICE
U. S. DEPT. of AGRICULTURE

CODE NO. | LABEL NO.

INSTRUCTIONS TO APPLICANT: Use this form when submitting each label for approval or comment. Review the checklist on the reverse of this form to assure that you are furnishing all the required information. The USDA can act promptly on your application only if all this information is included. Mail 3 labels and 3 completed copies of this form to the address shown in the heading.

DESCRIPTION OF LABEL SUBMITTED AND ACTION REQUESTED

1. TYPE OF LABEL *(Check one)*
☐ Finished label ready for use ☐ Unfinished label, not in final form

2. HOW LABEL WILL BE USED *(Check one)* CRY-O-VAC BAG — ARMOUR ✱ STUFFED YOUNG HEN TURKEY
☐ On shipping container ☐ On immediate container ☑ Other *(Describe)* STUFFED WITH GENUINE PEPPERIDGE FARM STUFFING

3. ACTION REQUESTED OF USDA
☐ Final approval
☑ Review and comment ☐ Temporary approval for ______ days to deplete inventory of approximately ______ labels

4. IF LABEL BEING SUBMITTED HAS BEEN COMMENTED ON PREVIOUSLY BY USDA, GIVE COMMENT DATE

PLANT NO. P. ON CLIP | DATE OF APPLICATION 8. 16. 63 | SIGNATURE OF APPLICANT AUG 16 1963

SPACE BELOW FOR ACTION BY USDA

☐ SATISFACTORY TO PRINT *(If modification is necessary, it will be noted below in "Remarks")*. SUBMIT 3 FINISHED LABELS FOR FORMAL APPROVAL.

☐ THIS NOTICE SHALL BE ATTACHED TO AND BECOME A PART OF PRIOR LABEL APPROVAL NO. ______

☐ LABEL APPROVED – *Provided that:*
- ☐ The label is for use with other approved labeling bearing all mandatory information.
- ☐ The vignette accurately depicts the contents of the package.
- ☐ Name of product will be checked or stamped in space provided on each label.
- ☐ Plant number insert is placed in each package and is clearly legible.
- ☐ Metal clip with P-______ embossed thereon *(Label approval No. ______)* is used as bag closure and identification of plant of origin.

☐ APPROVAL EXTENDED TO COVER SIMILAR LABELS FOR: ______

The total net weight of the poultry product including the stuffing must be shown in lieu of separate net weights.

LAW DEPARTMENT
CHICAGO

Any approval of or comment concerning this labeling material or the wording thereon as contained in this Notice must be understood to represent the attitude of this Service only, and does not excuse failure to comply with other applicable Federal or State laws, or city or municipal regulations.

FORM PY-132 (REVERSE)

Review the information shown on the label you are submitting against the checklist below. Doing so will help you to make sure that your label has all the information needed for consideration by USDA.

CHECKLIST

1. NAME OF PRODUCT

The common or usual name of the product is shown on the label.

2. NAME AND ADDRESS OF PACKER

The name and address of processor or distributor are shown on the label.

3. NET WEIGHT OF PRODUCT

The net weight of the product is shown on label *IN POUNDS AND OUNCES*, the appropriate fluid measurement is shown, or space is designated for showing this information.

4. INSPECTION MARK OR GRADE SHIELD

a. The inspection mark indicates that the product is inspected only; or

b. The letter grade on individually marked birds or the grade shield and inspection mark indicate that the product is inspected and Federally graded.

5. PLANT NUMBER

The method of indicating the plant number is shown.

6. EXTENSION OF LABEL APPROVAL

If the label approval is to be extended to various net weights, parts or classes of poultry, or to rubber stamp imprints designating applicable variations, triplicate copies of additional information are included with this application.

7. EXCLUSION OF GIBLETS

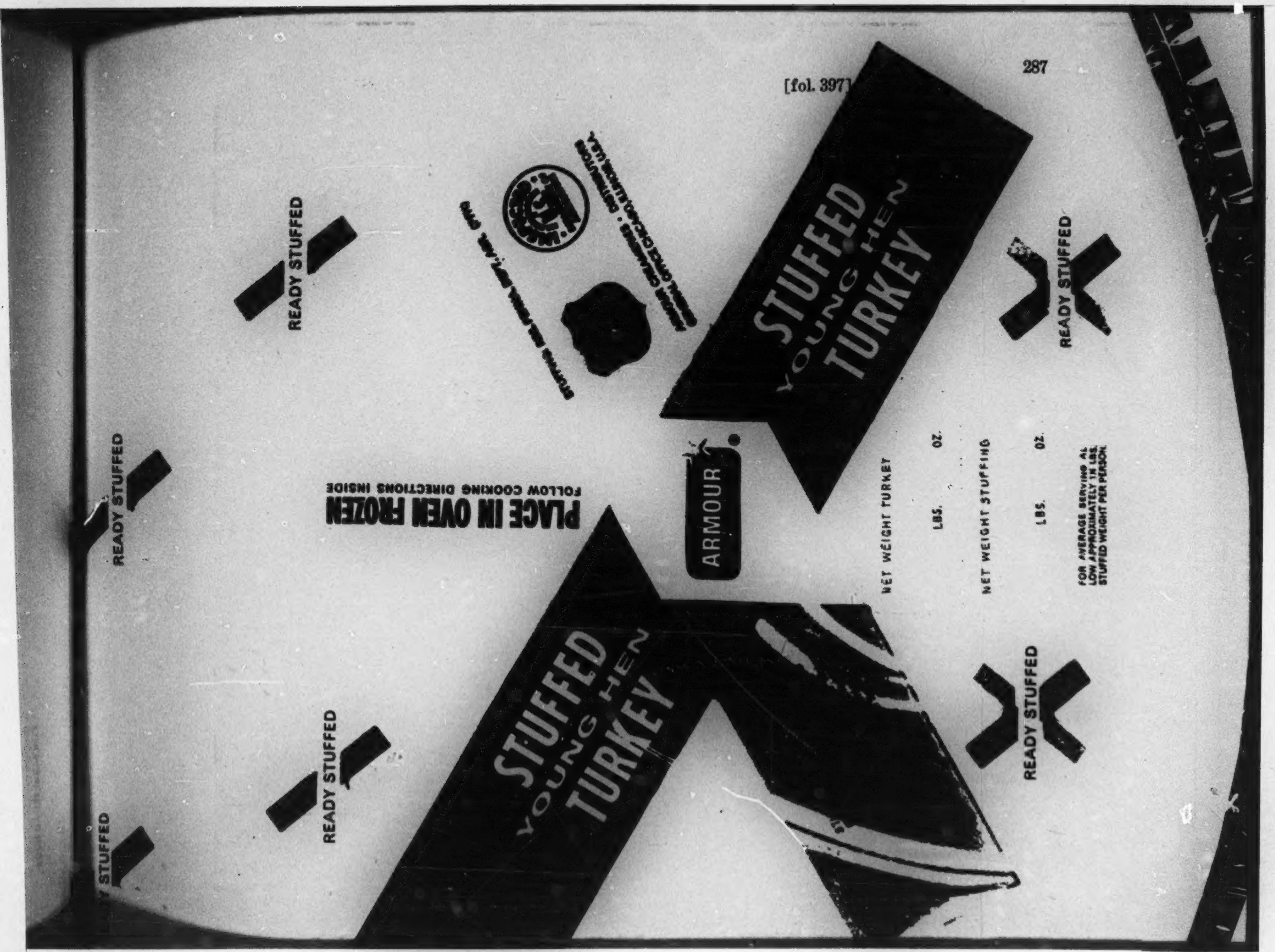
If label is for READY-TO-COOK BIRD(S) *(whole carcass or complete cut-up carcass)*, and giblets are NOT included, the fact that they are omitted is indicated on the label.

8. POULTRY FOOD PRODUCTS WITH FORMULA

a. If label is for a POULTRY FOOD PRODUCT WITH A FORMULA, the product formula, including the composition of all spices and flavorings used therein, together with a brief statement of the manufacturing process used, are included in triplicate on separate sheets attached to this application; and

b. If label is for a POULTRY FOOD PRODUCT WITH A FORMULA, the ingredient statement on the label lists each component in order of decreasing proportion, and components of mixtures *(batters, breadings, bases, stocks, broths, spice mixtures, etc.)* are separately listed following the name of the mixture.

NOTE: *True spices may be designated "spice," and powdered vegetable and spice extracts may be listed as "flavoring."*


STUFFED
YOUNG HEN
TURKEY
READY STUFFED
PLACE IN OVEN FROZEN
FOLLOW COOKING DIRECTIONS INSIDE
ARMOUR
NET WEIGHT TURKEY
LBS. OZ.
NET WEIGHT STUFFING
LBS. OZ.
FOR AVERAGE SERVING AL
LOW APPROXIMATELY 1½ LBS.
STUFFED WEIGHT PER PERSON.
STUFFED YOUNG HEN
TURKEY

[fol. 398]

PLAINTIFFS' EXHIBIT 9

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL RESEARCH SERVICE
Meat Inspection Division
Washington 25, D. C. 20250

YL—

December 12, 1963

Mr. Basil M. Vastola
Canada Packers, Inc.
24 State Street
New York 4, New York

Dear Mr. Vastola:

Reference is made to a letter dated December 7, 1962, addressed to you by Dr. James M. Mathis, Staff Officer for Labels and Standards, of this Division, indicating that the Division would approve a label for fruit garnished hams separately showing the net weight of the ham and the net weight including garnishment.

Our records indicate that Canada Packers, Inc. has not submitted for approval any labels bearing such separate net weight statements. We assume therefore, that your company will not be shipping into this country any hams with this type of labeling.

On several occasions this Division has disapproved labeling bearing such separate net weight statements. In view of the fact that the letter of December 7, 1962 is not consistent with the action taken in other cases, such letter is hereby withdrawn.

Sincerely yours,

J. C. deHoll,
Chief Staff Officer
Labels & Standards

[fol. 399]

PLAINTIFFS' EXHIBIT 10

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

February 10, 1964

Mr. John F. Madden, Director
Bureau of Weights & Measures
Building #7, Third Floor
State Campus
Albany 26, N. Y. 12226

Dear Mr. Madden:

This A.M., William J. Colavitto, attorney for Swift & Co. (meat packers), called me to ask if stuffed poultry could be sold in Suffolk County.

My answer was no, poultry is meat and must be sold by net weight of the meat (excluding stuffing).

An immediate reply by you of your opinion in this matter will be appreciated. Please give your opinion based on both the sale of cooked and uncooked poultry (stuffed).

Thank you for your prompt reply.

Sincerely,

/s/ JMK
John M. Kerbs
County Sealer

JMK:MM

* ANSWER: February 25, 1964
SEE: Director's Decisions

[fol. 400]

(Emblem)

STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS
DON J. WICKHAM, COMMISSIONER

BUREAU OF WEIGHTS
AND MEASURES
JOHN F. MADDEN, DIRECTOR
LABORATORY BUILDING
1220 WASHINGTON AVENUE
ALBANY 12226

February 25, 1964

Mr. John M. Kerbs
Sealer of Weights and Measures
County Center
Riverhead, New York

Dear John:

I wish to acknowledge receipt of your letter of February 10. Section 221.40 of Title 1 of the Official Compilation of Codes, Rules and Regulations of the State of New York provides as follows:

> "221.40 Meat, poultry and fish. Meat, poultry and fish, except shellfish, shall be sold or offered for sale as food by retail at net weight only."

In accordance with the rules and regulations, the sale of stuffed poultry is lawful, only if the net weight of the poultry, in addition to the net weight of the total combination product, is stated on the label.

Cordially yours,

/s/ JOHN F. MADDEN
John F. Madden
Director

JFM/s

[fol. 401]

PLAINTIFFS' EXHIBIT 11

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEPARTMENT OF WEIGHTS AND MEASURES
SUFFOLK COUNTY, NEW YORK

H. G. EHRHARDT
COUNTY SEALER

County Center
Riverhead, N. Y.

Telephone:
PA-7-4700 Ext. 23

February 6, 1962

Had a telephone call from the Long Island Press, asking what this Department has done about stuffing in Poultry. Seems that the New York City Department is making an issue of above.

Our Rules and Regulations state, "Poultry when roasted in advance of sale, the net weight shall include stuffing or dressing."

Watch for Frozen Poultry with stuffing, which is not cooked. Take off sale until further notice.

Notify office of Packer and seller.

H. G. EHRHARDT

[fol. 402]

PLAINTIFFS' EXHIBIT 12

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Emblem)

STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS
DON J. WICKHAM, COMMISSIONER
Albany 1

LEGAL BUREAU
ROBERT G. BLABEY, COUNSEL
GEORGE W. GLONING, JR., ASST. COUNSEL
THOMAS G. CONWAY, ASST. COUNSEL

August 21, 1963

Mr. E. E. Palmer
Manager, Poultry and Egg Division
2215 N. E. Kennedy Street
Minneapolis 13, Minnesota.

Dear Mr. Palmer:

Your letter of August 16 to Commissioner Wickham regarding the sale of boned and stuffed turkeys in New York State has been referred to this Bureau.

For many years Section 193 of the Agriculture and Markets Law provided that meat and meat products, among other food products "shall be sold or offered for sale by net weight." In regulations adopted and promulgated by the Commissioner, pursuant to statutory authority, and having the force and effect of law, poultry was included under the definition of meat, and thus, was required to be sold by net weight.

The City of New York and other municipalities enforced the regulation literally, insofar as stuffed turkeys were concerned, and prohibited the sale of stuffed poultry unless the net weights of the poultry and of the stuffing were separately stated in addition to the total net weight.

In 1962 and 1963, Section 193 above referred to, was substantially amended by the Legislature. It now defines food and food products as "all material, solid, liquid or mixed, whether simple or compound, used or intended for consumption by human beings or domestic animals normally kept as household pets and shall also include all substances or ingredients to be added thereto for any purpose." The amended section also provides in part, that all food and food products shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the Commissioner. Pursuant to the authority of that section, and after a public hearing, the Commissioner promulgated a regulation requiring that, "Meat, poultry and fish, except shellfish, shall be sold or offered for sale at retail by net weight only."

[fol. 403] Producers, particularly Swift & Company, attempted to market stuffed poultry in New York City, on Long Island and in some counties surrounding. The local weights and measures officials prohibited such sale and a conviction for such sales was secured in New York City. Many conferences with industry were held by this Department, the Attorney General's office and New York City officials. Serious objections were raised by some regulatory officials when the Commissioner suggested permitting sale of stuffed poultry by the total net weight declaration, although such officials were fully advised of the position of the U.S. Department of Agriculture, as expressed in the copy of the letter to you enclosed with your letter to the Commissioner.

In an attempt to resolve the problem, at the request of industry, a bill was introduced into this year's session of the Legislature. The bill would have permitted the sale of combination foods or food products with a declaration of the net weight of the combination product, and was identical in wording with Section 32 of the Model State Law on

Weights and Measures, adopted by the 27th National Conference on Weights and Measures (1962). Both houses of the Legislature passed the bill, but it was vetoed by the Governor.

In answer to your question as to where you stand in regard to the distribution of your product in this State, I can only state that in view of the Governor's veto of legislation specifically permitting the sale of such a product by total net weight declaration, the distribution and sale of stuffed poultry in New York State can only be permitted if the weight declaration shows the net weight of the turkey, the net weight of the stuffing, and the total weight. Unfortunately, Federal regulations do not permit such marking. The logical conclusion is that until either the regulation or its interpretation is held to be unlawful, improper or unconstitutional, such products cannot be sold in this state.

Counsel to this Department is authorized to render official opinions only to the Commissioner and officers of the Department. This response to your inquiry is unofficial and informal and is rendered in the hope that it may be of some assistance to you.

Yours very truly,

/s/ George W. Gloning, Jr.

George W. Gloning, Jr.
Assistant Counsel

GWG:R

[fol. 404]

DEFENDANT'S EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

63 Civ 3085

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,
Plaintiffs,

—against—

DON J. WICKHAM, Commissioner of Agriculture and
Markets of the State of New York,
Defendant.

ANSWER TO REQUEST FOR ADMISSIONS

SIRS:

Defendant, in answer to request for admissions heretofore served by plaintiff, Swift & Company, Inc., states the following, subject to all pertinent objections to admissibility which may be interposed at the trial:

1. Defendant admits the matter stated in paragraphs "1", "2", "3", "4" and "12" in the request for admissions.

2. Defendant cannot truthfully admit or deny the matter stated in paragraphs "5", "6", "7", "8", "9", "10" and "11" of the request for admissions because defendant has no knowledge concerning any notification that may have been given by the local sealers in the County of Orange; City of Newburgh, County of Rockland; County of Dutchess; City of Poughkeepsie; County of Suffolk and County of Nassau. That if notification was given, defendant has no

knowledge as to whom such notice was given and the contents of such notice.

DON J. WICKHAM
Commissioner of Agriculture
and Markets of the State of
New York

By: /s/ JOHN F. MADDEN
JOHN F. MADDEN
Director of Bureau of
Weights and Measures

To:

WILLIAM J. CONDON, ESQ.
Attorney for Plaintiff
Swift & Company, Inc.
19 West 44th Street
New York 36, N.Y.

EVANS, ORR, GOURLAY & PACELLI, ESQS.
15 Park Row
New York 38, N.Y.

[fol. 405]
STATE OF NEW YORK)
: ss.:
COUNTY OF ALBANY)

JOHN F. MADDEN, being duly sworn, deposes and says that he is the Director of the Bureau of Weights and Measures of the Department of Agriculture of the State of New York and that he is authorized to and does make this affidavit for and on behalf of the defendant and further states that the statements contained in the foregoing response for admissions are true to the best of his knowledge and belief.

/s/ JOHN F. MADDEN
JOHN F. MADDEN

Sworn to before me this
2nd day of March, 1964.

/s/ Dorothy M. Daley
Dorothy M. Daley
Notary Public in the State of New York
Residing in Albany County, No. 369
Commission Expires March 30, 1965

[fol. 407]

DEFENDANT'S EXHIBIT B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civil 3085

Swift & Company, Inc. and Armour and Company,
Plaintiffs,

—against—

Don J. Wickham, Commissioner of Agriculture and Markets of the State of New York,
Defendant.

Examination Before Trial of Robert William Burke, pursuant to notice dated December 4, 1963, held at the office of the Attorney General, 80 Centre Street, New York, N. Y., on the day of December 19, 1963.

APPEARANCES:

Louis J. Lefkowitz,
Attorney General of the State of New York
80 Centre Street
New York, New York
CO 7-9800

By: **Philip Kahaner,**
Assistant Attorney General
Lester Esterman,
Assistant Attorney General

Evans, Orr, Gourlay and **Pacelli,** Esqs.
15 Park Row
New York 38, N. Y.
CO 7-1800

By: **William J. Condon,** Esq.
19 West 44th Street
New York 36, New York
William J. Colavito, Esq.
YU 6-0430

A. Perillo
S. Graber
Hearing Reporters

[fol. 408] It is hereby stipulated and agreed, by and between the attorneys for the respective parties herein, that all objections except as to form, shall be reserved until the time of the trial.

It is further stipulated and agreed, that the signing of this deposition may be made before a notary public or a commissioner of deeds, with the same force and effect as if such deposition was executed before a Judge or Clerk of this Court.

It is further stipulated and agreed that the filing of the deposition be waived and that a copy be served upon claimant's attorney without cost.

Dated: New York, N. Y.

Evans, Orr, Gourlay and Pacelli, Esqs.
Attorneys for Armour and Company

By: /s/ William J. Condon

Louis J. Lefkowitz
Attorney General
of the State of New York

By: /s/ Lester Esterman
Assistant Attorney General

[fol. 409] **Robert William Burke**, having first been duly sworn, testified as follows:

Examination.

By Mr. Kahaner:

First, this examination is held pursuant to a notice. I take the deposition of Plaintiff Armour & Company and I offer this notice in evidence. Will you mark it Defendant's Exhibit 1.

(Received and marked as Defendant's Exhibit 1, on the day of December 19, 1963.)

Q. Mr. Burke, what is your—what are your duties with Swift & Company, with Armour & Company?

A. I work in the New York office on 43rd Street, my position is Procurement Manager, dairy, poultry, and margarine products for the eastern area.

Q. Are you familiar with the way these turkeys are shipped, these stuffed turkeys. Are you familiar with the stuffed turkey business of Armour & Company?

A. Yes, sir.

Q. And where does Armour & Company have its plants?

A. They have two plants, one in Turlock, California, and the other one is Barron, Wisconsin.

Q. And where do most of the stuffed turkeys, where are they shipped from say into the eastern part of the country?

[fol. 410] A. No, sir; they're shipped all over the country.

Q. Well, do you have those turkeys that are shipped out of Wisconsin, do they come and go all over the country?

A. Normally they would come east from a geographical standpoint.

Q. So that turkeys that would be shipped into New York, New Jersey, Connecticut would be shipped from Wisconsin?

A. Normally.

Q. Are there any other states that they would be shipped from?

A. No, sir; just the two I mentioned, California and Wisconsin.

Q. Does Armour & Company have a packing plant in New York?

A. Stuffed poultry, no.

Q. Do they have any—do they—what type of plant do they have in New York?

A. In New York, none to my knowledge, that is in my connection with dairy, poultry and margarine, which I am responsible.

Q. Do they pack any other meat products?

A. In New York State or New York City?

[fol. 411] Q. We're talking about New York State?

A. New York State, I can recall a cheese plant in Carthage, New York, no poultry. There are table ready meat plants in various cities in New York State.

Q. Did they ever have a poultry plant in New York?

A. I do not know.

Q. How far can you go back, sir?

A. I have been in the employ of Armour & Company since September 5th, 1962.

Q. Oh, so you don't know anything about Armour and its activities prior to 1962?

A. Not from—only know—I don't know anything about Armour & Company prior to 1962.

Q. What was your position prior to 1962?

A. Prior to that I was the sales manager of poultry products.

Q. For whom?

A. I was with Washington Creamery Corporation. I had a job prior to that.

Q. But of your knowledge do you know whether Armour had a packing plant for poultry and meat in New York State?

A. Not to my knowledge, no.

Q. Armour sells meats or poultry, does it come into New York State from other states?

A. Poultry I can only speak for, Mr. Kahaner, there is no poultry from any plant in New York State to my knowledge.

[fol. 412] Q. But poultry that's shipped into New York State comes in from other states? Wisconsin?

A. Stuffed poultry does, yes, sir; poultry yes.

Q. Does Armour have any other plants for poultry that's not stuffed, that's not in Wisconsin or California?

A. Yes, sir; they do, sir.

Q. Where are those plants?

A. I can't enumerate them all, but I can tell you there's one in Salisbury, Maryland, Barron, Wisconsin, a chicken plant, there's one in Marshville, North Carolina, Wisconsin a turkey plant. There's one in Mississippi, there's one in Alabama, Sadalia, Mississippi, and I am sure there are other plants I can't recall.

Q. But stuffed turkeys only come out of packed and shipped from Wisconsin and California?

A. And Turlock, California, that's correct, sir.

Q. Do you know the process that goes on in Wisconsin at the plant and how these turkeys—

A. The technical end I am not familiar with.

Q. Does Armour have their own turkey farms in Wisconsin, or do they purchase these turkeys from individual independent farmers?

A. I am not familiar with the live operation. I can't honestly answer the question.

[fol. 413] Q. Well, are you familiar with the slaughtering operations in Wisconsin?

A. Would you clarify just exactly what you mean?

Q. What type of turkeys are picked for, say for stuffing?

A. I know that they pick a government graded A bird.

Q. Well do they pick any other type of bird if stuffing is not required other than a grade A bird?

A. That isn't a case of selecting, when they go out and get a flock of turkeys it would be utopia if all birds were government graded, but unfortunately there are grade A's B's and grade C's in every flock.

Q. But as to stuffed turkeys what grades are they?

A. U. S. Government Grade A.

Q. Are you familiar with the government inspection system in Wisconsin or any of the other packing plants?

A. I have never studied them thoroughly, no, sir; I have read various provisions.

Q. But, in other words, we will confine ourselves with Wisconsin because from Wisconsin these birds, these stuffed turkeys are shipped east?

A. Most normal cases, yes.

Q. Well, are you familiar with the way the turkeys are selected and slaughtered and submitted for inspection in Wisconsin?

[fol. 414] A. No, sir.

Q. Do you know anything that goes on in Wisconsin?

A. I know what they have available for sale.

Q. Well could they tell you, in other words, how did you go about getting or providing yourself with the, with stuffed turkeys?

A. My formal procedure—

Q. Yes.

A. Is to find out what stuffed turkeys are available in the particular plants and we'll take Baron, Wisconsin, and they'll give me an inventory stating there is so much boxes and certain sizes and from there I go and try and sell them or ship them to various units that want them.

Q. So that they go in Wisconsin, Armour & Company will without worrying about your orders or your particular order for the east, they will have an inventory on hand of stuffed turkeys, is that right?

A. That's correct, sir.

Q. There are frozen and stuffed right together shipped?

A. That's right.

[fol. 415] Q. In other words, they don't wait for you to give them an order before they do any stuffing or killing them?

A. They maintain a normal inventory.

Q. And where do they—have they got a warehouse where they keep these stuffed turkeys available for shipment?

A. Yes, sir.

Q. In Wisconsin?

A. Yes, sir.

Q. And you're not familiar with the process of how they're stuffed or anything like that or what goes into the stuffing or—

A. No, sir, I am not.

Q. Do they give you any idea of how many pounds of stuffing goes into what weight bird?

A. No, sir.

Q. When you ask them, in other words, when you ask them for an inventory of their stuffed turkeys, do you tell them that you need so many weighing so many pounds?

A. Yes, that's correct, we order them by size.

Q. And that size is the complete turkey including the stuffing?

A. That's correct.

[fol. 416] Q. They don't stuff them separately for you, in other words you don't tell them you need a bird that's five pounds of meat and two pounds of stuffing or vice versa?

A. No, sir; I order them by size and by size I mean the total weight of the bird including the stuffing.

Q. Have you ever been out to the plant, did you watch the process of the birds being stuffed?

A. Yes, once.

Q. What is the operation that—if you can remember how is the thing set up?

A. I can't answer you from a technical standpoint, because I am not familiar enough with the technicalities that go into it, I am a salesman.

Q. From a visible standpoint?

A. The thing that stands out most in my mind is the absolute cleanliness of the place. It almost reminds you of an operating room in a hospital.

Q. Very sanitary?

A. Very, very sanitary and even the employees I mean all their uniforms are absolutely clean—it's just a picture of cleanliness when you walk in.

Q. Did you notice the way the birds come in on assembly line, I assume there's some assembly line operation?

[fol. 417]

A. Yes, there's an assembly line operation.

Q. Well, the birds are coming in all dressed, and ready to be stuffed on this assembly line?

A. They come in completely eviscerated.

Q. Well, what's the difference between dressed and eviscerated, you mean they could be dressed without being eviscerated, is that it?

A. I think in laymen's terms that evisceration and dressed mean the same.

Q. And did you notice anybody stuffing these turkeys?

A. Oh, yes.

Q. Did you notice when the turkeys were weighed?

A. Yes, sir.

Q. When were they weighed?

A. They were weighed after the birds were stuffed.

Q. What type of stuffing machine do they use?

A. I do not know, sir.

Q. Did you see them being stuffed?

A. Yes, sir.

Q. Do they stuff them by hand?

A. No, sir; they're stuffed with some kind of an—I am strictly guessing, some kind of an air pressure something.

Q. Something like a gun?

A. Extruder is the correct word you'd use. I am not [fol. 418] familiar with the technical end of it at all.

Q. In other words, as the birds—each one of these girls who are handling takes a bird and stuffs it as it goes by her with this gun?

A. That's the procedure as I recall being used at that time, yes.

Q. Do you know whether these guns were automatically set so that they would put so much stuffing in, or is it up to the girl's guess or imagination of how much stuffing the bird should contain?

A. I do not know.

Q. Were there any specification about so many pounds of bird, of turkeys should contain so many pounds of dressing?

A. Not to my knowledge.

Q. So actually all you did is saw these turkeys on an assembly line being stuffed and the girls using this gun type instrument stuffing each turkey as it went by her?

A. I just generally observed the operation, yes, sir.

Q. Did you ask about it and inquire about the type of stuffing they used?

A. No, because I understand it's a Pepperidge Farm dressing and I did not ask any technical—

Q. What do you mean by understand, how did you get this?

[fol. 419] A. From reading on the label, sir.

Q. You mean after the bird was received in New York you noticed that? That's how you know it, the label contains an identification of the stuffing, in other words, the maker of the stuffing?

A. Yes, if I recall the label says stuffed with Pepperidge Farm stuffing on the label.

Q. Every label on the stuffed turkeys has that inscription?

A. That's correct, sir.

Q. They don't use any other stuffing?

A. Not to my knowledge. I never heard of any other.

Q. And do you know the ingredients in this stuffing, or—

A. No, sir.

Q. Did you notice whether these turkeys were all the same weight as they went by?

A. No, sir; they were not all the same weight as they went by.

Q. Well, what weights did you notice?

A. I am just guessing, using an educated eye, looking at them at that particular day I was up there they were dressing mostly five to nine pound turkeys.

Q. And they were all going one time down this assembly line, is that it?

[fol. 420] A. Down one single assembly line, yes.

Q. In other words, there would be a five pound one, and a seven pound one and a nine pound one, and a six pound one, all different types of turkeys going down this assembly line?

A. In that particular range, yes.

Q. And as each girl reached for one of these turkeys did she have any identification of the weight of this turkey?

A. Not to my knowledge.

Q. But she took it and stuffed it?

A. Yes.

Q. Well, did some—did the gun operate for longer periods of time in one case, was it ever, the gun, was it set to operate just so much stuffing into the bird?

A. You're the one that used the word gun. I used the word gun or hose or extruder which is one, and—

Q. You mean there is one gun for everything?

A. One girl stuffing.

Q. One girl, oh, there is one girl stuffing every turkey on this line?

A. Yes.

Q. That went down?

[fol. 421] A. This particular hour, or half hour I was in that plant that's what was going on.

Q. And this girl was with—did you say she used more stuffing for different birds or was the amount of stuffing that went into it, the same for each bird alike?

A. I do not know.

Q. Did you ask?

A. No, sir; I did not.

Q. So for all you know a nine pound turkey contained the same amount of stuffing as a five pound turkey? I mean as far as you know by not asking?

A. Nine pound turkey, how did you phrase that again?

Q. From what you said you didn't inquire, you didn't know, but you noticed that these were birds from five to nine pound birds, so that as far as you know the same amount of stuffing went into a nine pound turkey as went into a five pound turkey?

A. From my knowledge, that statement would not be true.

Q. Did you, after the turkeys were stuffed, did you know what happened?

A. Yes, I did.

Q. What happened?

A. They were bagged, it's called a cryovac bag.

Q. And then what?

A. Then this cryovac bag, which is spelled C-R-Y-O-[fol. 422] V-A-C cryovac bag was put in a shrinker, which shrinks the bag.

Q. How about the turkeys?

A. Doesn't shrink the turkeys, shrinks the film.

Q. What about the weight, when do they weigh it?

A. After it comes out of the shrinker, it passes over a scale, it passes over a scale where the net weight of the product is put on.

Q. Now, when you say the net weight, you mean gross net weight, the weight of the turkey, the weight of the stuffing, and the weight of the bag?

A. The weight of the bag is not put on, sir. That is we can't sell a, we can't sell a cryovac bag that weighs—

Q. Is the weighed before it's bagged or after it's bagged?

A. It's weighed after it's bagged, but there's allowances made for the bag and the clip?

Q. I see. And then what happened?

A. It goes into a—they're sorted by weights and they're cartoned, then placed in a freezer.

Q. During this period is there any federal man there inspecting?

A. Constantly.

Q. Did you notice any of them there?

A. Oh, yes sir.

[fol. 423] Q. What were they checking?

A. I presume he was performing his duties.

Q. Don't give me your presumption, did you know what he was doing?

A. He was observing the whole operation.

Q. And he saw this girl stuffing the turkeys?

A. Yes, sir.

A. And he was standing by on the side, looking at her, is that it, or walking up and down?

A. As I recall he was observing walking around.

Q. How many were there while you were there at this operation?

A. Well, I recall one, although there could have been others, I recall one.

Q. But you remember one?

A. Yes, I do, sir.

Q. And he was watching the turkeys come down the line, was he checking as to wholesomeness in these turkeys to see whether they were fresh and everything?

A. Yes, sir; that would be part of his job.

Q. Don't tell me what it would be, what was he doing that you noticed?

A. I can just tell you he was observing the operation.

Q. That's all?

A. Yes.

[fol. 424] Q. Did you ever see him go over and look at it and touch it?

A. No, sir.

Q. And then did he check into the stuffing or anything or just watching this whole thing, observing?

A. He observed.

Q. And then when it went into the weight house, was he there when it was weighed too?

A. No, sir. If you mean if he was standing specifically observing the weight all the time, no, sir; he wasn't.

Q. But he couldn't do that and watch the assembly line operation?

A. That's right.

Q. When it was weighed did somebody put a stamp on this stuffing?

A. It's done with a marking pencil, sir; this marking crayon I guess you would call it, a water proof marking crayon.

Q. That's put on this bag?

A. Yes, sir; it is sir.

Q. And then from there it goes into what, how did they put this numerical weight on, where do they put it on, if at all? How does it appear on the actual turkey that's sup-[fol. 425] posed to be shipped?

A. There is on the bag a square, it says pounds and ounces and the person puts on weight on puts, for example nine pounds, one ounce, whatever the scale shows.

Q. And that's the final label that's used on this bird or is there any label put on?

A. No, there's a final label that's used on the bird.

Q. Did you notice whether any attempt was made to weigh these birds before they were stuffed?

A. I did not notice sir.

Q. And after they are put into a bag and labeled, do you notice whether the inspector inspects them again or anything like that?

A. I did not observe that, sir.

Q. What happens after that?

A. They're placed in the master carton, and then they are placed in the freezer.

Q. What's this a shipping carton?

A. Yes, shipping container, or master carton.

Q. How large is that?

A. Six head per carton.

Q. Six?

[fol. 426] A. Six birds go in one carton.

Q. And these birds are of different weights naturally?

A. They're put in the master carton by class and the class is usually two pound variation like a six to eight bird, eight to ten, ten to twelve, etc.

Q. So, it's easier for the company to ship if they get an order say six to eight pounds or eight to ten pound birds they just go in this carton, is that it?

A. That's correct, sir.

Q. So there are no more than six birds in each shipping carton, or do these birds go into another carton a much larger carton for shipping purposes?

A. No, sir six head to a container.

Q. And then what happens after the birds are put, the stuffed turkeys are put into this carton?

A. They go into a freezer.

Q. At the, in Wisconsin at the company plant?

A. Right there, yes; right there.

Q. And this is just solely for stuffed turkeys in the freezer or—

A. No, sir; there are other products besides stuffed turkeys.

[fol. 427] Q. And ordinarily how long can these stuffed turkeys remain in that freezer before they're shipped?

A. How long they remain in there? Well, they can remain in the freezer until they're sold. Normally we hope they go out right away, but to answer this question, how long they can stay in a freezer. I cannot answer it for the State of Wisconsin, I don't know what their laws regarding the length of time that a carton can stay in a freezer are.

Q. Well, how long actually can you get a turkey stuffed without any deterioration?

A. Without any variance of temperature, anything else, technically I don't know, but I would say a long time, like many years.

Q. So, in other words, if there wasn't any call for these stuffed turkeys at the moment they could stay for six months or a year?

A. Depending on what the local laws in that state are.

Q. Like, you say you don't, the company doesn't depend on you giving them an order before they slaughter these turkeys, or dress them, or stuff them, they have them available?

[fol. 428] A. That's the normal procedure.

Q. And then now we come down to the way, how do they ship, after you call them, in other words, you will call Wisconsin, Armour & Company and ask them if they had just, how many birds, stuffed turkeys they have available or just ask them if they have got enough for your order, is that how it is?

A. Well, I personally go through the Chicago office, which in turn gives out the information from Barron, Wisconsin, yes sir.

Q. So it is your testimony on how it is worked, is that you find out how many turkeys, stuffed turkeys they have available and then you go out to sell them, or is it—

A. It works both ways. We like to procure a lot of orders and be able to call up the plant and say we got orders for so many, ship them.

Q. But it happens the other way, where you get a call from your office to sell these turkeys, right?

A. That happens in all—

Q. They have got a batch of stuffed turkeys and they [fol. 429] say to you to keep busy, to sell them, is that it?

A. Yes, that can happen, that can happen.

Q. And when is the season for the stuffed turkeys, is it all year round?

A. We have a normal season year round, but we have a greater demand in October and November and December then we do the other nine months out of the year.

Q. In other words, there's a greater demand for it during the Thanksgiving and Christmas holidays?

A. That's correct, sir.

Q. And during the rest of the year the demand is slow?

A. There is a nominal demand for them, yes sir.

Q. Well, how long have you been selling stuffed turkeys since your, since 1962, you say?

A. You mean with just Armour & Company.

Q. Yes.

A. With just Armour & Company, since September 5th, 1962, I have been buying and selling. I am in procurement, but I have sold too.

Q. You have been buying and—

[fol. 430] A. What they call a procurement manager, but I also do some selling, yes, sir.

Q. What do you mean by procure?

A. I procure products that are needed for Armour & Company in dairy, and poultry and margarine.

Q. I am talking about stuffed turkeys. You just sell them?

A. I procure them.

Q. In other words, you get them from Armour, you don't buy them from anybody else, do you?

A. That's correct.

Q. And you since 1962, how many pounds of stuffed turkeys have you sold in New York State?

A. Since 1962, in New York State, to my knowledge we haven't sold any since, I believe it was, January, February of 1962. In New York State.

Q. Well, are you sure of that?

A. I have no records to prove it with me, no, sir.

Q. You mean you have not received any orders from your stores or supermarkets for any stuffed turkeys since you have been manager of Armour in New York?

A. We have received requests from stores located in New York State for stuffed turkeys in the period.

[fol. 431] Q. And what have done with that request?

A. We have told them we weren't allowed to sell them in New York State.

Q. Did you tell them why you weren't allowed to sell them?

A. Yes, sir; we did.

Q. What did you say?

A. We told them, because of an interpretation of the law, both in the City of New York and the State of New York.

Q. Well, did you get these requests from the City of New York or from outside the State of New York?

A. Both.

Q. City of New York?

A. Both.

Q. And do you know whether any stuffed turkeys were sold by Swift & Company prior to 1962?

A. By Swift?

Q. By Armour & Company?

A. Yes, sir; we sold turkeys prior to that time in 1962.

Q. Were you with the company at that time when they were selling them prior to 1962?

A. Well, I came there September 1962, and I can't answer that question. [fol. 432]

Q. You mean since you're there they haven't sold any?

A. That's correct.

Q. Have you any records?

A. In New York State.

Q. We are talking about New York State, have you any records to show how much stuffed turkeys Armour & Company sold prior to your, prior to 1962?

A. I have no records, but it's been stated that it was around a quarter of a million pounds.

Q. And for how long a period was that?

A. This was I understand a one year period.

Q. In one year they sold a quarter of a million pounds?

A. Yes, sir.

Q. Of stuffed turkeys?

A. Stuffed turkeys.

Q. In New York State?

A. In New York State.

Q. And dollar wise, how much would that be?

A. Let's see, I am just trying to think of the average price of them, they were someplace around fifty cents a pound so, it's half of that amount, which would bring it down to what? [fol. 433]

Q. A hundred twenty five thousand dollars?

A. A hundred twenty five thousand dollars.

Q. You say that was during 1961?

A. Yes, 1961.

Q. In other words, the year prior to the time that they didn't sell them, in '61, you can say definitely that you heard they sold a quarter of a million?

A. That's correct.

Q. Who did you hear this from?

A. I heard it from somebody within our company. I think they stated such a figure to one of these trials or court cases or something, when I have heard it. I can't tell you who told, me sir.

Q. You have no record in your office?

A. I personally have no record.

Q. How about 1960, do you know what they were doing then?

A. No, sir; I do not.

Q. Of course the fact that they didn't sell these two [fol. 434] hundred and fifty thousand pounds of turkey didn't mean they lost the turkey business, they sold unstuffed turkeys during that period, would you say that?

A. That's a presumption.

Q. So that, in other words the people who couldn't buy the stuffed turkeys bought the unstuffed turkeys?

A. I couldn't answer that question.

Q. Well, would you say that persons who couldn't buy the stuffed turkey would buy a non stuffed turkey if you couldn't get a stuffed turkey?

A. I think it's a normal assumption.

Q. Well, did you find out whether the—how many pounds of unstuffed turkey was sold in 1962 while you were there?

A. I do not have the figures, sir, I don't know.

Q. You don't know how many pounds were sold in 1962?

A. No, sir.

Q. Well, aren't you interested in knowing the turkey business of Armour & Company for a year?

A. Yes, sir; I am.

Q. Is it that you just got the figures with you?

A. I could get such figures.

[fol. 435] Q. Those figures are available?

A. Yes, sir.

Q. They know exactly how many pounds of unstuffed turkey they sold in New York State in 1962?

A. Yes, sir; those figures could be gotten.

Q. But you don't have any recollection of what those figures are?

A. That's correct.

Q. Would you know whether they were greater than 1961?

A. What was greater?

Q. If the sale of unstuffed turkeys were greater in 1962 then 1961?

A. I would not know that, because I do not know the figures.

Q. And you wouldn't know whether they were less?

A. No, sir, I would not know.

Q. You don't know whether Armour & Company suffered any loss by being unable to sell stuffed turkeys in 1962?

A. Suffered a loss in the sale of stuffed turkeys?

Q. Suffered an all around loss in their turkey business?

A. Well, no, sir; I couldn't answer that question. I couldn't honestly answer the question.

[fol. 436] Q. For all you know they could have sold more turkeys in '62 then they sold in 1961, is that right?

A. That could be possible, yes, sir.

Q. Are those figures available?

A. Yes, sir; those figures are available. Could be made available.

Q. Could I have those figures?

Mr. Condon: I am speaking for Armour & Company, I think you can.

Mr. Kahaner: Here's the figures I'd like to get. I'd like to get the figures of the years—

Mr. Condon: Do it off the record.

(Discussion off the record.)

Q. How many turkeys, stuffed turkeys—how long has Armour & Company been selling stuffed turkeys in New York State?

A. I have heard that it's over five years.

Q. So that brings it down to fifty-eight?

A. Yes.

Q. Now how many stuffed turkeys were sold in '58, do you know?

A. I do not know.

[fol. 437] Q. I am talking about pounds now?

A. That's correct, sir.

Q. As to 1959 do you have any figures on the amount of stuffed turkeys sold by Armour, the pounds of stuffed turkey sold by Armour in 1959?

A. I do not.

Q. Do you know how many pounds of unstuffed turkey?

A. I do not know, sir.

Q. The same question is to 1960, do you know the amount of unstuffed turkey, pounds of unstuffed turkey sold in New York State in 1960?

A. In 1960, I do not know.

Q. And the amount of the pounds of unstuffed turkey in 1960?

A. In 1960 I do not know.

Q. The same question as to 1961 do you know the amount of stuffed—how many pounds of unstuffed turkey in 1962?

A. That period where I just spoke of, a quarter million pounds, I believe, sir.

Q. But you heard, which is hearsay?

A. That's correct.

Q. Somebody told you and you don't even know who?

[fol. 438] A. That's correct, sir.

Q. How about the amount of pounds of unstuffed turkey in 1961?

A. I do not know, sir.

Q. But you'll get that information and fill in these answers at the time your transcript is sent to you?

A. Yes, sir; we will.

Q. Now, these years I'd also like to know the amount of the value, the value, actual value to the company what they received for the sale of stuffed turkeys and unstuffed turkeys, each one?

A. This is for the State of New York only.

Q. State of New York, during '58 to '62, cause you say in '63 they made no effort to sell stuffed turkeys?

A. In the State of New York, yes.

Q. I also would like to get from you up to the present time in 1963, the pounds and value of unstuffed turkey since you haven't sold stuffed turkey?

A. Does this take in all grades also?

Q. Yes, I want to know your entire business, dollar wise of stuffed and unstuffed turkeys. Do you know how these turkeys, stuffed turkeys are shipped from Wisconsin?

A. Yes, sir.

[fol. 439] Q. How do they ship?

A. The normal procedure is to put them on a refrigerated truck. We also ship them by refrigerated rail cars.

Q. So that these stuffed turkeys come into New York from either trucks or rails?

A. That's correct.

Q. Freight cars?

A. That's correct. Refrigerated freight cars.

Q. How do the containers—can you describe the containers which are shipped by rail and truck from Wisconsin?

A. The container surrounding the birds are the same regardless if they go by rail or truck, and that container to describe it would say that it's made out of a very strong fiber board, or cardboard as we would know it, and is usually secured by a metal clip or another thing that they use to keep the box together so that it's rigid, there's two or three different—

Q. How big is this container, the shipping container, sir? I mean approximately?

A. I am guessing, it's twenty-eight inches long and it's eighteen inches wide and that it's fifteen inches high, that's close. It's a box like that.

(Indicating)

[fol. 440] Q. And that's the container that the stuffed turkeys are originally packed at the plant and Swift & Company—at the plant in Armour & Company before they go into the freezer, is that the—

A. That's the shipping containers that's the original container. The bird never comes out of the original container.

Q. But as to shipping by truck or mail, does it go into another container?

A. No, it does not.

Q. It stays in that original container?

A. It stays in that original container, sir.

Q. And is this piled into the freight car, refrigerated freight car, or is it piled in that same way into the truck, the refrigerated truck?

A. It's stored in a rail car and truck.

Q. But, you don't know of, do you know of any containers, other containers that it may be shipped in?

A. I do not know of any other containers.

Q. In your experience all these stuffed turkeys that have come into New York State have also come in shipped in these containers that you have just heretofore described? [fol. 441] A. To my knowledge the only way I ever heard is as I have just described.

Q. And what, in other words, they come through the different states, is that it, say from Wisconsin east into New York and from the trucks come in, do you ship any by plane?

A. No, sir.

Q. And what happened when they come into New York?

A. The usual procedure.

Q. Describe specifically when they come in by train and when they come in by truck?

A. Well, presume that the train load, or the railcar load or the truck load is sold to a customer.

Q. No, we are not assuming anything. We are just assuming they're coming into New York, and our orders, I mean on what would happen? Let's go back a little?

A. They're in a refrigerated warehouse, sir.

Q. You call your home office Chicago, assuming and you either tell them you need so many stuffed turkeys or they tell you this is what they want you to sell, so many stuffed turkeys?

A. Yes, sir; that's correct.

Q. Now, when they told you they want you to sell so many stuffed turkeys, do you tell them to ship the turkeys, the [fol. 442] stuffed turkeys to you and you sell them or do you say wait til I get orders for them, or do they ship them to you without orders?

A. The normal procedure is that they'll ship to us upon our order.

Q. You'll order from Chicago so many pounds of stuffed turkeys, is that right?

A. That's correct.

Q. Whether you have any commitments for them or not?

A. No, sir; we'll order from Chicago upon commitments.

Q. Would you ever order them without a commitment?

A. Yes, well, during the holiday period.

Q. Well. And that most of the time that you order them is during the holiday period, is that when you really sell these stuffed turkeys, right?

A. Our movement is greater in the holiday period.

Q. So, that during this period, when you sold most of your stuffed turkeys, you ordered them without any particular committments as to from your retail or wholesale end of it, is that it?

A. That can be possible, yes.

[fol. 443] Q. Well, do you have an idea of how much you think you might need during this period or does it vary according to the amounts of stuffed turkeys the Armour people have in the plants?

A. Well, the normal procedure is to estimate in your own mind what you feel that the market will absorb in a particular area, and using that as a guide we order in so many turkeys during this time of the year when they move greater.

Q. So now during the time we are talking about this holiday period say from October through December?

A. Right.

Q. How do these—you have no specific commitments for these turkeys they come in by rail, what happens?

A. They go into a refrigerated warehouse, public warehouse, refrigerated public warehouse.

Q. What do you mean by public, it's not your own warehouse?

A. It's not our own warehouse.

Q. Does Armour have any warehouses here in New York?

A. No, sir; no, sir; not here in New York.

Q. So you're compelled to use public or private warehouses?

A. That's right, sir.

[fol. 444] Q. Which are operated by other companies?

A. That's correct.

Q. In other words, you rent space in these warehouses?

A. We pay the normal storage rates.

Q. And what, who, how are these unloaded, just give me the routine. You know a shipment has reached New York, where it comes in by rail?

A. Normally, we would probably put it into the Manhattan Refrigerated Company.

Q. It comes into the what, where on the freight yards, where?

A. I do not know the freight yards.

Q. Where does it come into New York by freight, where does the train stop?

A. At the destination, which is the public warehouse.

Q. And they're different public warehouses, right?

A. Yes, I believe there's seven or eight.

Q. How do you allocate or direct these specific freight cars to the different warehouses, or storage houses?

A. We put them into the particular warehouse which we think will be most advantageous to our customers.

Q. So that they come into the—they reached the border [fol. 445] of New York, they come into New York by rail, are they put on these cars, are they shunted to the warehouse?

A. Yes, sir; usually each warehouse in New York City, I believe they all have what we call a railroad siding, so it goes right into the side.

Q. But the freight, the party who's in charge of the freight car knows where these specific freight cars containing the stuffed turkeys supposed to go, what particular warehouse? Who shunts them into the particular warehouse, who knows what goes to what place?

A. It's probably—

Q. Do you have any part, anything to do with that?

A. I'll give the order as to where the particular rail cars shall be, as you say shunted, where it's to be placed.

Q. When you know they tell you that they are shipping, say two freight cars loaded with stuffed turkeys, you know that that's coming in from Wisconsin into New York, right?

A. Yes.

Q. You make arrangements to have them cars delivered to this, these public warehouses for storage?

A. That's correct.

[fol. 446] Q. Do you notify the public warehouse men about it?

A. Yes, sir; we usually advise them in advance, which is the normal, the normal advance notice at least forty eight hours to say prepare to receive a carload of turkeys.

Q. Do they make arrangements with the freight yards for those freight cars to be shunted into this siding, near this particular warehouse?

A. Their traffic department would see that they're placed on the siding.

Q. So actually they take care of that, not you?

A. They physically handle in unloading the car.

Q. So actually there is no unloading of these stuffed turkeys until they get into the siding of the particular warehouse?

A. That's correct, sir.

Q. Public warehouse?

A. Public warehouse.

Q. And it's not yours. Armour has none?

A. In New York City.

Q. And they are unloaded at the significant warehouse by your employees or by employees of the—

A. Public warehouse employees.

[fol. 447] Q. And they go into a particular part of the warehouse that's been reserved for Armour & Company?

A. We do not reserve the space, but we request that they be placed into a public warehouse with a temperature of zero or less degrees.

Q. And then when the are in there, you're notified that these turkeys have arrived?

A. We receive a warehouse receipt of that effect.

Q. And you know how many stuffed turkeys it contains, when you get those, is that so many pounds of stuffed turkeys or does it say a hundred packages?

A. No, sir; the bill of lading, or the bill, or the invoice which states the number of boxes and the net weight of all the boxes.

Q. And by that time you know this time you know the weight of the particular box, within two pounds, is that it?

A. We know the particular weight range of the birds within two pounds is the normal procedure.

Q. And how long do they stay in this particular public warehouse?

A. Till they're sold.

[fol. 448] Q. Give me the name of some of the warehouses that you use?

A. Manhattan Refrigerated Company, 525 West Street, New York. Merchant's Refrigerating Company, West 17th Street, and Tenth Avenue, New York City. Kings County Refrigerating Company, it's in Brooklyn. Those are the ones that we use that are in the City of New York.

Q. And then how are those stuffed turkeys removed from the warehouse?

A. The normal procedure is that a customer to whom we have sold some, will send his truck to the public warehouse and the public warehouse upon—

Q. This customer is who, a wholesaler? Who is he actually?

A. Could be a wholesaler, or a retailer or a jobber.

Q. Who do you consider a wholesaler, somebody who sells to retailers?

A. That's my definition of a wholesaler.

Q. How would you describe a supermarket with say ten branches in New York City say or New York State?

A. We would call them a chain store.

Q. Is he a retailer?

[fol. 449] A. He's a retailer.

Q. So you have wholesalers who give you orders who in turn sell to retailers, right?

A. Yes, sir.

Q. And you have retailers who call you direct?

A. We do, sir.

Q. Now, just what is the method of how these particular people pick up the stuffed turkeys from the public warehouses?

A. You would like to know the usual procedure.

Q. How does that work, yes.

A. The usual procedure is one of our salesmen will call on an account and sell them some stuffed turkey. The company will inform our salesmen as to how many boxes he wants, what time he wants to pick them up at the public warehouse.

Q. The company, does that mean you, does he check with you, your salesmen as to what is available at these different warehouses, public warehouses?

A. Yes, sir; they usually check with me to see what stock's available in different warehouses.

Q. And then your salesmen, in other words you give him an idea of how many pounds of stuffed turkey you have available, and the weights of the particular stuffed turkey?

[fol. 450] A. And the class we put it.

Q. And then you tell them to go out and sell them?

A. Generally that's the idea.

[fol. 451] (At this point in the hearing, S. Graber relieved A. Perillo and the hearing continued as follows:)

Q. And he goes out to advertise particular customers who could be a wholesaler or a retailer?

A. Could be, sir.

Q. And the other way is a wholesaler or a retailer can call you?

A. That is correct, sir.

Q. And ask you if they have a need for certain type of stuffed turkey, certain pounds?

A. Yes.

Q. When the salesman sells to the retailer or he sells to a wholesaler, what happens after that, after he takes the order?

A. The order is given to our clerk in the order department. He telephones the public warehouse. He orders the merchandise out using the lot number which has been supplied by him on a warehouse receipt. He tells the warehouse order department how many boxes he wants and who the customer is. Then the warehouse writes up that order and when the customers' truck appears at the public warehouse he is given the merchandise on the strength of the written order that we have given.

Q. In other words, the warehouseman knows already the identity of the individual or company that's going to pick [fol. 452] up the certain amount of stuffed turkeys and then prepare a receipt letting the amount out of their storage capacity, is that it?

A. That's correct.

Q. This is their own trucks, the retailers and wholesalers own trucks?

A. That is true in ninety-nine percent of the cases.

Q. In ninety-nine percent of the cases you are telling me that the wholesaler and the retailer send their own trucks to the public warehouse to pick up whatever they have ordered?

A. That's the usual procedure, I would say.

Q. In other words, they know already what particular—

A. I will withdraw the ninety-nine percent and say that is the usual procedure.

Q. What percentage, would you say, pick up their own merchandise from the public warehouse?

A. More than half.

Q. So it's fifty to sixty percent, would you say?

A. More than that.

Q. Am I right in saying fifty-five or sixty percent?

A. That's an arbitrary figure, yes.

Q. What happens to the other part of the hundred percent, the thirty-five percent, the forty percent? How do they get their merchandise?

[fol. 453] A. There are some customers that do not have trucks where we may hire an outside trucker and that is a trucker not owned or operated by Armour Company. We may call him and say, deliver a certain amount of boxes to a certain account.

Q. Do you ever have occasion in the warehouse— In other words, he says he wants one hundred pounds of stuffed turkeys, have these turkeys weighing six pounds apiece. Suppose the boxes come to 120 pounds. How do you give him one hundred pounds out of a box of 120 pounds?

A. The usual procedure, they do not order by pounds. They usually order by head count. A particular wholesaler or retailer will as a very rare thing call up and say, give me ten thousand pounds of turkeys. He will probably say, give me a thousand boxes of turkeys.

Q. Does he ever buy by the pound? Do you ever have to break up any of these containers?

A. We do not break containers.

Q. In other words, you are sure that these containers are never broken and left unbroken in the warehouse?

A. That is correct. They are never knowingly.

Q. Did you ever have occasion to break up a container and give somebody three or four of the turkeys and keep two?

A. No, sir. I have not had that occasion.

[fol. 454] Q. In your experience, containers that are sold are never broken up so the retailer or wholesaler has to take that particular container no matter whether it is more weight?

A. I just said he doesn't order by weight.

Q. Do any do? Can you give a categorical no or maybe?

A. Maybe.

Q. What happens in the maybe case where they order by pounds?

A. We would have to ask the public warehouse to take down so many cartons of stuffed turkeys which we are now speaking of to add them up until they came close to the total requested by the customer and this is highly unusual.

Q. When you ship these containers that you described—

A. Boxes.

Q. Boxes, is there a weight on top, a total weight of the container?

A. Yes, sir, on the exterior of the box there's a net weight and pounds and ounces.

Q. Plus a weight of the containers?

A. No, sir, a net weight.

Q. How do you pay your freight charges on that?

A. Well, our freight— There are two ways depending what method of transportation you use, but there are some trucks which will charge us on the net weight of the product and there are some trucks on the gross weight of the product.

Q. If the gross weight isn't there on the package, who [fol. 455] figures that?

A. The gross weight is estimated, sir. They estimate the weight of one carton and then multiply it by the number of cartons in the trucks. For example, 1,000 cartons in the truck and each little carton, they estimate weighs two or three pounds. They just tack that on.

Q. And then they add the amount of the container, is that it?

A. Figure it in.

Q. But as far as you know, none of these shipments are broken up for anybody?

A. That's correct.

Q. Where the wholesaler or retailer doesn't pick up his particular shipment you hire a public conveyance to ship the order to your particular customers?

A. That is correct.

Q. In other words, you don't have your own truckers?

A. Armour & Company does have their own trucks.

Q. Do they pick up any of these packages and take them to the retailer or wholesaler?

A. Yes, they could do that, sir.

Q. In your previous testimony from what you said, all of the shipments are either picked up by the retailer or by public conveyance that you hire or rent?

A. Right.

Q. Is there an occasion when your own truckers employed by Armour & Company pick up these containers at the [fol. 456] public warehouse and ship them or deliver them to retailers or wholesalers or is that rare?

A. That is rare, but our own trucks that would go to the public warehouses would normally be picking up a supply of turkeys for perhaps one of the Armour Company branches. That is the usual procedure. We have branches in New Jersey.

Q. Retail branch?

A. No, sir. Wholesale branch.

Q. In other words, to take it to another Armour & Company plant in another state?

A. That's correct.

Q. Otherwise you wouldn't use your trucks to make deliveries in New York State from the public warehouse to the particular retailer or wholesaler?

A. I do not know of any such instance.

Q. The retailer— When the wholesaler picks them up, who are some of your wholesalers? In New York State.

A. Just numerous accounts, Mr. Kahaner. To be specific and name some of them—Nathan Schweitzer & Company, Ottman & Company. There are many, sir.

Q. When they pick up these packages, now they pick it up at the public warehouse and where do they take them?

A. They put them on their truck. I do not know what their order is.

Q. You mean they could either deliver them to a retailer or bring them in to their own warehouse?

A. Yes, sir.

[fol. 457] Q. You don't follow once it leaves the public warehouse?

A. That's correct.

Q. You never continue your inspection or anything after that?

A. That's correct.

Q. In other words, once the order is given by the wholesaler or retailer and is picked up the next thing you are interested in is billing them?

A. That's right.

Q. Do you ever go into your retail shops where your turkeys are being sold, your stuffed turkeys?

A. Yes, sir.

Q. How would the turkeys be displayed?

A. Turkeys normally?

Q. Stuffed turkeys.

A. They are normally displayed in a frozen food cabinet, self-service cabinet in a chain store.

Q. How about an ordinary retail butcher store?

A. They would also display his frozen turkey in a frozen food self-service cabinet.

Q. Does he display them in the package that it comes in?

A. He takes them out of the package, sir.

Q. He displays them individually in his display counter, right?

A. That's correct, sir.

[fol. 458] Q. And you noticed that all the time when you visited these places?

A. Yes, sir.

Q. The retail shops that you visited have these turkeys displayed individually in their display counters away from the original package?

A. Away from the shipping containers.

Q. When we talk of shipping containers, we are talking about original packages?

A. We are talking about the containers from what it is shipped.

Q. There is no other container that these stuffed turkeys are shipped in?

A. No, sir.

Q. When they leave the factory, the plant in Wisconsin packed in those containers of six turkeys each and when they reach the retailer, they are in the specific container, that same container and then the retailer takes them out of the container and displays them?

A. That's correct, sir.

Q. Does the Federal Inspection Service follow the turkey after it arrives in New York?

A. No, sir.

Q. There is never any further inspection by any federal authority when the turkey reaches New York? As a matter of fact, there is no federal inspection after the turkey is put in Wisconsin into the freezer, is that it?

[fol. 459] A. That's correct, sir.

Q. Once it's stamped and inspected before it's put in the freezer that's it and it stays that way without further inspection by the federal authorities?

A. There is no normal— That's correct, sir. There is no further inspection.

Q. After the salesmen sell the turkeys, do you bill them from your home office in New York?

A. Yes, sir, if they are sold out of this particular New York department.

Q. As far as the turkey business, do you sell more turkeys in New York than you do in any other state?

A. I do not know, sir.

Q. Did you ever have a state inspector visit your plant or examine any of the stuffed turkeys when they came into New York?

A. Not to my knowledge, sir.

Q. That's since 1962?

A. That's correct.

Q. Did you ever hear of a state inspector examining Armour & Company turkeys prior to 1962?

A. No, sir. I never did.

Q. Did you ever receive any literature from the state telling you how to sell these turkeys as far as weights are concerned?

[fol. 460] A. No, sir. I never did receive any literature.

Q. Did anybody ever tell you that they did receive such literature prior to the time that you have been there?

A. This literature describe—

Q. Any literature from the Department of Agriculture of the State of New York?

A. Literature, no, sir.

Q. Any correspondence?

A. Correspondence from the State of New York in reference to selling stuffed turkeys? No, sir, I never did receive them.

Q. Then why did you stop selling stuffed turkeys in New York City?

A. We stopped selling stuffed turkeys because, I understand, the weights—Mr. Pacetta from the Weights & Measures here, that is the gentleman that has given tickets, I believe, to the retailers for selling stuffed birds and that the retailers were turning their thumbs back to us and said they can't sell them because it is against the law.

Q. Did Armour & Company ever get served with a summons for violation of the labeling law pursuant to Section 193 of the Agricultural & Market Act?

A. I do not know.

Q. Since you have been there?

A. No, I never received any and I do not know all the branches we have.

Q. Would you know if such a thing had happened, would you ordinarily know that any summonses were served on [fol. 461] Armour & Company?

A. I would normally hear about it through channels. Sure I would.

Q. Had you heard of any?

A. Not since I have been in the office. I can't recall any specific instance.

Q. So you never heard of anything from the state with reference to labels? You never received any literature from the Department of Agriculture & Markets calling your attention to any statements on labeling, is that right?

A. I personally have not received any.

Q. You would be the person to receive it if any such literature or official knowledge, notice would come to Armour & Company?

A. No, because I can visualize if it was of a legal nature where it would go to the legal department in Armour & Company.

Q. Did the legal department ever advise you that they had received such a notice?

A. Not me, no, sir.

Q. Since you are there?

A. Yes.

Q. And that's since 1962?

A. 1962.

Q. You don't know of anybody else in your department having received such a notice?

A. No, sir. I do not know.

Q. The reason you stopped selling in New York City is [fol. 462] because of Commissioner Pacetta in issuing summonses for violation of this label act?

Q. I am talking about the reason that you are not selling any is because of Commissioner Pacetta who is a city official and not a state official, is that right?

A. Yes, I understand he's a city official.

Q. He's what? Do you know his title?

A. I am guessing. The Department of Markets or Department of Weights & Measures.

Q. He's the commissioner?

A. Commissioner.

Q. And as a result of his notice to you personally?

A. No. To our customers.

Q. He has notified what, retailers and wholesalers that they cannot sell stuffed turkeys?

A. Yes, sir. Retailers especially. I can't speak for wholesalers.

Q. These retailers have told you personally that they can't tell you it?

A. They have told us in Armour & Company.

Q. And because of Commissioner Pacetta's order?

A. Yes.

Q. Why couldn't they sell it, did they say why?

A. He stated—

[fol. 463] Q. Who is "he"?

A. Mr. Pacetta's office.

Q. Now, you are telling me what the retailer told you what Pacetta told them?

A. Right. That stuffed turkeys, they had to state the amount of stuffing and the weight of the bird had to be shown on the package.

Q. You yourself never heard this directly from Mr. Pacetta?

A. No, sir. I never met the gentleman.

Q. And you never heard this from Commissioner Wickham or anybody in his office, is that right?

A. That's correct.

Q. All you know is that suddenly there was nobody ordering these stuffed turkeys in New York City or did this happen gradually over a period of time?

A. It happened over a short period of time. I do not know how long.

Q. Did Swift & Company ever get served with a summons that you know of from Commissioner Pacetta's office?

A. No, sir. I don't know.

Q. You don't know of any such summons?

A. No, sir.

Q. Did you ever come in and try to defend a retailer who was served with a summons—

A. Not to my knowledge.

Q. —from Commissioner Pacetta?

[fol. 464] A. Not to my knowledge.

Q. Did any of these retailers tell you that they had been served with these summonses?

A. Not me personally, but I had heard.

Q. Who told you?

A. Other salesmen.

Q. Didn't you feel to come in and defend them or do you know actually what happened after these summonses were served?

A. No, I don't know actually what happened.

Q. You weren't interested, is that it?

A. Yes, I was interested in—

Q. But you didn't follow it up?

A. No, sir.

Q. You don't know if they were convicted or acquitted?

A. No, I don't know.

Q. Did you hear of Swift & Company being convicted of the sale of these stuffed turkeys?

A. Convicted, no, sir. I don't recall seeing a conviction.

Q. You never heard of that?

A. Not—I heard them being cited for it. I don't understand the legal—

Q. But Armour & Company was not cited nor convicted or brought into court, is that it?

A. I do not know.

[fol. 465] Q. At least since you are around?

A. To my knowledge I do not know that this happened.

Q. If such a thing would have happened, you would probably know, is that it?

A. I would probably hear about it.

Q. And you haven't heard anything?

A. No, sir.

Q. Do you sell these turkeys in any other parts of New York besides New York City?

A. No, sir. We do not.

Q. Are you sure that you haven't sold these stuffed turkeys in Dutchess County?

A. Since when?

Q. Since this year.

A. No, sir. Not to my knowledge in any place in New York State.

Q. You are sure of that?

A. I can't prove it.

Q. As a result of the representations made to you by retailers that they were of Commissioner Pacetta's order, you stopped receiving any orders from your customers for stuffed turkeys and therefore didn't sell any, is that it, in New York State?

A. Yes, sir. That's right.

Q. How about the rest of the customers in New York State? Did they tell you, don't sell or did you stop just because of New York City?

[fol. 466] A. I really don't know. I can't recall any particular outside instance. I won't say there was never one, but I don't recall it.

Q. Prior to this time, were you selling stuffed turkeys all through the State of New York?

A. Yes, sir. We were.

Q. Most of your stuffed turkeys were sold in the City of New York?

A. A greater volume would be in the metropolitan area.

Q. But there was sufficient quantities sold in the rest of the state, is that right?

A. There were quantities, but I do not know the amounts.

Q. Why did you stop selling the rest of the state?

A. Because of orders that come out of Albany. It was against the law to sell.

Q. I asked if you got anything officially from Albany, from the Department of Agriculture. You said no.

A. That's correct.

Q. Where did you hear this? This is hearsay you are talking about?

A. Well,—

Q. Nothing official?

A. To me you are asking?

Q. Well, you are the one who is responsible, who will tell the salesmen to sell them in New York State. Don't you have the responsibility of having your salesmen sell these stuffed turkeys in the entire State of New York?

[fol. 467] A. No, sir. I am not the sales manager.

Q. Don't you want to know why they are not selling them in the rest of the state?

A. I explained that the reason they are not buying is that the retailers can't buy them from us.

Q. That's New York City?

A. The same with the state. They can't buy it from us.

Q. How do you know they can't?

A. Because they have been told it's against the law.

Q. How do you know they have been told?

A. I don't know they had been told.

Q. So actually you have no information on why you stopped selling stuffed turkeys to the rest of the state?

A. I believe there is an interpretation of the law.

Q. Do you know personally of any specific order directed to you or to anybody else in Armour & Company which made you stop selling stuffed turkeys in the rest of the State of New York, outside of New York City?

A. To me personally, no.

Q. Do you know of anybody that received such notice in your organization in Armour & Company? Be specific.

A. You are asking for an individual now.

Q. Anybody of authority connected with Armour & Company in New York.

A. I cannot answer the question.

Q. If you do find out, will you have that information [fol. 468] available for us prior to the trial of this case?

A. All right, fine.

Q. And if I do not hear from you I will assume nobody received any notice, official or otherwise, from the State of New York, the Agricultural Department, that they couldn't sell the stuffed turkeys in the State of New York.

A. All right.

Cross examination.

By Mr. Condon:

Q. Mr. Burke, have you sold or Armour sold any stuffed turkeys in the State of New York since you came on with Armour & Company?

A. No, sir. Not in the State of New York, no.

Q. Decision, whatever it was, was made prior to the time you came to the company?

A. That's correct.

Q. Each one of these stuffed turkeys, the time it's processed, is wrapped in individual cryovac containers, is that correct?

A. Bag.

Q. It is a container, isn't it?

A. Well, we in the business call a container the plastic container which is the cardboard carton.

Q. What's written on the cryovac bag? You said the weight was written on it?

A. Yes, sir.

Q. Is there anything else written on it?

[fol. 469] A. There is printed on it the government inspection seal, the government grading, the label stating what's in the turkey. The label will say, this is an Armour Star stuffed turkey stuffed with Pepperidge Farm stuffing.

Q. That cryovac bag remains on the turkey until it gets into the retail establishment?

A. Yes, sir.

Q. Does it remain on the turkey beyond that?

A. Yes, sir.

Q. It remains on the turkey until when?

A. The consumer receives it in that same cryovac bag.

/s/ Robert William Burke

Subscribed and sworn to before me
this 14th day of February, 1964.

/s/ William P. Woods

William P. Woods
Notary Public, State of New York
No. 30-9741855
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1964

(Seal)

[fol. 470]

DEFENDANT'S EXHIBIT C

[Stamp—U. S. District Court—Filed Feb. 17, 1964—S. D. of N. Y.]

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civil 3085

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,

Plaintiffs,

—against—

DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,

Defendant.

Examination Before Trial of H. W. MAIDLOW, pursuant to Notice dated December 4, 1963, held at the Office of the Attorney General, 80 Centre Street, New York, New York, on the day of December 19, 1963.

APPEARANCES:

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S. Graber
A. Perillo
Hearing Reporters

[fol. 471] It Is Hereby Stipulated and Agreed, by and between the attorneys for the respective parties herein, that all objections except as to form, shall be reserved until the time of the trial.

It Is Further Stipulated and Agreed, that the signing of this deposition may be made before a notary public or a commissioner of deed, with the same force and effect as if such deposition was executed before a Judge or Clerk of this Court.

It Is Further Stipulated and Agreed that the filing of the deposition be waived and that a copy be served upon the claimant's attorney without cost.

Dated: New York, N.Y.
January 31, 1964

/s/ William J. Condon
Attorney for Plaintiff,
Swift & Company, Inc.

Louis J. Lefkowitz
Attorney General of the
State of New York

By: /s/ Lester Esterman
Assistant Attorney General

[fol. 472] H. W. **Maidlow**, having first been duly sworn, testified as follows:

Mr. Kahanar: You are here pursuant to a notice of oral examination served on Swift & Company?

The Witness: That's right.

Mr. Kahanar: Dated December 4, 1963. I offer this as Defendant's Exhibit Two.

(Received and marked Defendant's Exhibit Two.)

Q. Mr. Maidlow, you are with Swift & Company?

A. Right.

Q. What is your position?

A. I am the poultry man for the New York territory.

Q. When you say "New York" is that the State of New York?

A. That takes in New York, New Jersey, Philadelphia, Meadville, Erie, Buffalo and then down—I don't have Albany, but down parts of Connecticut.

Q. Most of the State of New York including the City of New York?

A. That's right, and Nassau and Suffolk, the Island too.

Q. Have you had occasion to visit the offices of Swift & Company where they stuff their turkeys?

A. No, sir. I have not.

[fol. 473] Q. Where do they have their plants for stuffing?

A. In Detroit Lakes, Minnesota.

Q. Is that the only state?

A. That's the only place.

Q. And that place supplies stuffed turkeys to the rest of the U.S.?

A. That's the only one I am familiar with. There may be one where we stuff turkeys in California, but if we do I don't know where it is.

Q. The stuffed turkeys that come into New York come from Minnesota?

A. That's correct.

Q. And you have never been to the plant?

A. I have been to the plant, but not to see the turkeys stuffing operation.

Q. Did you hear testimony of the previous witness?

A. Yes, sir.

Q. Mr. Burke, of Armour & Company?

A. Yes, I did.

Q. Would you say that Swift & Company stuffs their turkeys in the same manner as Armour & Company?

A. I don't think I am qualified to pass on it.

Q. You have no idea of how they do it?

A. I have ideas, but I don't think I am qualified.

Q. You have some idea of how the turkeys are stuffed?

A. Yes, I have an idea.

Q. How do you know besides being there personally?

A. Film only.

[fol. 474] Q. Was this a film that was shown to employees here in New York?

A. This was a sales promotion film a portion of the film showed them stuffing turkeys.

Q. And this film was made by Swift & Company?

A. For Swift & Company.

Q. Was it identified as being made at the plant?

A. The film was not identified as being made at Detroit Lakes, Minnesota, but I do know that it was.

Q. What do you remember about the film? How the turkeys come in, when they are dressed. You describe just how they are stuffed.

A. I would say on the basis of the film, the only difference that I can readily point out between what was previously described and our operation—

Q. Previously described as to Armour?

A. Yes, our turkeys are weighed before they are bagged and the weight marked on them they then go into a liquid-freeze tank. We liquid-freeze our stuffed turkeys. That doesn't mean much to you but that's a brine tank that these turkeys go into and they float the length of this tank which freezes them about three-eighths of an inch in and when they come out of that they are put in the same type of container that was previously described. Some of them are four head boxes; some of them are six head boxes, depending on the size of the turkeys because we pack from six pounds to fourteen pounds. From this brine tank with [fol. 475] the top off they go into a fifty below freezer and there that freeze is pushed on through the turkey and after they are completely frozen, then the top is applied on the container and they are ready for shipment. That's essentially the only difference that I could discern—

Q. The actual weight of the bird whether before it's put in the bag or after the bird is stuffed, the turkey is stuffed at the time that it is weighed?

A. Right.

Q. It is not weighed prior to this turkey being stuffed?

A. Yes, sir. That's correct.

Q. How about the method of stuffing. Did they show that?

A. Yes, and it was essentially the same as the previous testimony as far as I could see.

Q. They had one girl there?

A. I don't know whether it was one girl. I mean, the same method was used as far as I could see.

Q. Would you say the same amount of stuffing went into a five pound bird as went into a fourteen pound bird?

A. No, sir.

Q. How would you know?

A. There is no way to tell because the turkey is stuffed.

Q. As you watched this girl stuffing the bird, did you [fol. 476] notice her spend more time stuffing the bird with a larger turkey than with a lighter weight turkey?

A. Only stuffing it until it was full of stuffing regardless of the size of the bird. They were just stuffed; that's all you could say.

Q. In other words, it was up to the girl to determine the amount of stuffing in the bird?

A. The interior was filled with stuffing.

Q. You don't know whether she left the half the interior unfilled?

A. Only that it looked like it was stuffed.

Q. They didn't show a real close-up of the inside of the turkey?

A. You couldn't see the inside of the turkey with the stuffing; you only assume.

Q. What type of stuffing was used by Swift & Company?

A. All I know is it is supposed to be white bread stuffing.

Q. They don't use Pepperidge?

A. No.

Q. They make their own stuffing?

A. They make their own.

Q. Is that labeled any particular way, the stuffing?

A. No, it just says "with stuffing."

Q. Are the ingredients listed as to what the stuffing contains?

A. Yes, I think there are ingredients like onion and so [fol. 477] forth on the bag and then it also says over and above what was previously testified, that the weight includes the stuffing. It's very plain on the bag that the net weight includes the stuffing.

Q. Is that what's on the bag of Armour & Company too?

A. I don't know about Armour. Ours shows that very clearly.

Q. Did you notice this U.S. inspector on the premises?

A. No, I didn't.

Q. He wasn't there during the entire time the film was taken?

A. The film, you didn't see enough. You saw the girls on the line and the stuffing.

Q. With no particular inspector walking around?

A. If you looked at the film and you might see an inspector.

Q. You didn't see any inspector?

A. No.

Q. Did you notice anybody standing while the bird was weighed or stuffed near the girl?

A. No, not that I recall.

Q. How were the orders received by Swift & Company, that operation?

A. Our deal is a little bit different. We operate differently. We have forty-three sales units scattered and we sell two different ways. We sell direct to people where product is shipped direct from the plant to chains such as [fol. 478] Grand Union and A & P. Then we have sales units into which we ship stuffed turkeys as well as other turkeys and resell them out of the sales units, some of which we deliver, some of which customers pick up, as the case may be.

Q. How is this worked out? Does the plant in Minnesota depend on your orders before it gets these?

A. No, not necessarily. It's up to them to produce stuffed turkeys for the entire United States or the territory they service and at all times we in the sales end of the business look to them to have products available for us. So that when we send in an order they can ship.

Q. They don't depend on you?

A. They do depend on us to get the order.

Q. In other words, suppose they get an order from you for 1,000 turkeys and from New Jersey, they will just make up those orders?

A. It depends a lot, depends on when you are selling this product. We sell in advance and for spot delivery which is current delivery. So if we took an order today for 1,000 boxes of turkeys, in January they might accept that order because there is time enough to pack those turkeys for the order. So it works both ways depending on timing.

Q. When you call up and give the order, do they call you and say, we have extra turkeys?

A. They constantly call us and anxious to sell all the time. They are always looking for business.

Q. In other words, they always have more turkeys than [fol. 479] you fellows could sell?

A. Usually that's true, but there have been times that that wasn't true.

Q. They always have sufficient turkeys, stuffed turkeys on hand?

A. Ordinarily it's very seldom or you might get caught short for a week.

Q. Do you have the season too that Armour testified to? In other words, the October to December is busier than the rest of the year?

A. Well, our busy season on turkeys, I think, generally I would say is from September first through Christmas, but stuffed turkeys like other turkeys today are a year-round item in stores. People buy them. In fact, a lot of people will buy stuffed turkeys other than the holiday period. Let's say starting in January, that wouldn't buy them during the Holiday Period— Because of smaller families they—will buy a stuffed turkey and put it right in the oven at holiday time and they will buy maybe twenty pound turkey and make the stuffing and all the things that go with it.

Q. So when you order 500 turkeys for delivery your order is sent to Minnesota?

A. We place our orders with our poultry department in Chicago and they handle the order from there. They place [fol. 480] it, and we tell them when and where to ship it and the size and it may be broken down into four or five. We break it down into two pounds, weight differentials six to eight, 8-10s, 10-12s etc. We may give them orders for so many eights, tenth, etc.

Q. And when that order is taken in, they are taken into storage?

A. We don't go into storage. That's something different with ours. We either go direct to the chain warehouse.

Q. I am talking about when they come out of Minnesota. They are taken out of the storage and shipped either by freight or by truck, same operation as Armour?

A. That's right.

Q. And they stay and they are shipped in that identical box carton?

A. That's correct. It's a fibreboard.

Q. Containing either four to six turkeys?

A. That's right.

Q. You know that these shipments are coming in by truck or rail?

A. That's right. We get a confirmation of every order we place. We know how and when and how to expect it.

Q. Do they ever ship you any turkeys without orders?

A. No.

Q. Swift & Company said they put—they are shipped practically without order and they put them in these public warehouses?

A. So that we don't misunderstand, we never get a [fol. 481] turkey in our sales unit without an order from me.

Q. You heard Armour & Company say that they were shipped in by rail or truck and then sent to a public warehouse?

A. We don't use public warehouses. We may use public warehouses in Minnesota. In other words, it's possible and I don't know how this works, particularly, specifically on stuffed turkeys, but on other turkeys I would assume it's the same. We have limited freezer space in these plants and when we get beyond our own freezer space in these plants we may transfer out and into a commercial freezer nearby and then if that was the case we could ship out of the commercial freezer to either a customer or other sales units.

Q. In other words, you have your own freezer space?

A. In our sales units.

Q. In New York?

A. Yes, New Jersey, New York.

Q. Which is operated by Swift & Company?

A. That's right.

Q. Which is not Armour, they didn't have that facility?

A. Except they might have in New Jersey.

Q. What they are saying is in New York, they don't have their own freezer space?

A. That's right.

(At this point in the hearing, A. Perillo relieved S. Graber and the hearing continued as follows:)

[fol. 482] Examination.

By Mr. Kahaner:

Q. Now, we have arrived at the point where the rails, they come in by rail?

A. Or truck.

Q. Or truck, and they reach New York. They're in New York, you are notified that the freight train has arrived or the shipment has arrived in New York?

A. No, they're, they're automatically, we place the order, we tell them where to ship them when we place the order, so consequently if they come in by rail, the rail car goes right to the sales unit and when it arrives it's unloaded, now—

Q. Now, what is this sales unit, that's Swift and Company's own sales unit?

A. That's right.

Q. And where could they be located, all through the State?

A. We have one on 13th Street, 453 West 13th Street. We have one 182 Fort Greene Plaza. We have one at 9400 [fol. 483] Sixth Street, Williamsburg. We have one at 132nd Street and 12th Avenue in Harlem, and we have one in Mineola.

Q. Now, are there freight facilities for all these places?

A. Yes.

Q. They have sidings where these trains can roll right in?

A. Yes, sir.

Q. And shunt the freight car containing the stuffed turkeys?

A. In New York they may stop the car at the 3rd Street yard and call them and say we have car so and so when do you want it. They know where it's going before it ever leaves New York, when it leaves the plant they're destined.

Q. And you go there, deliver the freight car containing the stuffed turkeys, deliver it to the sales office?

A. That's right, sales unit.

Q. And that place has its own refrigerated plant?

A. That's right.

Q. Everyone that you mentioned has their own refrigerated plant?

[fol. 484] A. That's right.

Q. And they're taken who unloads them?

A. In most places we unload them, with our own people, although in a few spots, we have outside unloading crews that unload at night, I mean, but they're still there unloading for Swift, in other words we pay them for the unloading.

Q. And they're put right into this unit?

A. Right into the freezer.

Q. Of each particular unit?

A. That's right.

Q. And they're still, they're still in the original boxes?

A. That's right.

Q. And then you—they're stored there?

A. Right.

Q. For how long?

A. Until we sell them.

Q. In other words, you might have an order for these turkeys and you might not have?

A. They might go out the next day, they might go out two weeks later, depending.

[fol. 485] Q. Who do you sell to?

A. We sell—we don't sell wholesalers, we sell retailers and chains.

Q. Exclusively?

A. Yes.

Q. In New York State?

A. We may sell institutions also. Hotels, restaurants, and institutions.

Q. You have, you send salesmen out and they know already—

A. At some places we have outside salesmen, at some places we do not. Some places are strictly what we call call houses, not the call houses you maybe thinking about, but we call them call houses, and in, and in those everything is hauled out and everything is sold over the phone. We have no outside salesmen, for example; 13th Street that I spoke of is strictly a call house. I mean they telephone, they solicit business by phone, but anything that we sell is hauled away by a truck.

Q. By the purchaser?

A. Yes, by the purchaser. Now, there are times when we'll have a purchaser that wants us to hire a truck to deliver to him, but it's not our truck, we have no trucks, [fol. 486] no trucking facilities at all.

Q. So actually you don't do any deliveries, you don't make any deliveries to your retailers or your chains?

A. Not at that type that type of operation.

Q. Of the call houses?

A. Yes.

Q. But of the other houses, the other units?

A. The other houses we have both kinds. We have, we deliver and we also have call trade, what we call call trade that come and pick them up.

Q. What do you do when you finish, do you break up the boxes?

A. We don't break up the boxes.

Q. They must buy whatever is in the box?

A. Four, or six, that's right.

Q. So nothing stays broken, in your plant?

A. No, it goes out in the original container that comes from the plant.

Q. And the people that come in and pick them up, these retailers or chain stores that send their own trucks too?

A. Some of them have truckers that go around and pick [fol. 487] up. They have buyers on the street and the trucks go around and pick up what the buyer buys. You never know what might be on the truck, A & P has a hired trucker that comes into the market and picks up all types of merchandise for them.

Q. And they'll stop off at your unit and pick up some of the stuff there?

A. Yes.

Q. And stuffed turkey?

A. It may be. I mean it just so happens that we haven't had anything like that with A & P. I happen to mention A & P but I mean it could happen with other people.

Q. Are trucks refrigerated when they pick them up?

A. Oh, yes.

Q. And then when they come, they're delivered to the retailer or to the A & P or whatever happens, they take them out of the container, they store—

A. And they go to people like the A & P, and I deliver into warehouses usually and warehouses then put them on the trucks going out of the warehouses. And they're distributed to the stores.

[fol. 488] Q. They go to a retailer?

A. A retailer takes them and puts them in his walk in cooler or freezer, whatever it is, and then when they sell them he takes them out of the box and displays them or sells them.

Q. In other words, he doesn't display—he displays them separately in the display cabinet?

A. I've never seen any of them displayed in the original box and stuffed turkeys.

Q. And what—now as to the amount of stuffed turkey sold by Swift and Company, how long have they been selling stuffed turkey in New York State?

A. I think in 1956 was when we started selling stuffed turkey. I have been here since January '55, and I think it was '56.

Q. Prior to this time no stuffed turkeys were sold?

A. I think that's when we started it was '56.

Q. And what dollar-wise—how much—what was the amount of stuffed turkey?

A. I am not going to be much help to you, because of [fol. 489] the way our accounting is set up. We do not separate our sales of stuffed turkey and other turkeys. We lump all turkeys together and we have only one figure, just turkeys.

Q. Well, what was the one figure in '56?

A. You got me, I don't recall.

Q. It's available? Will you have that available?

A. Are you talking now about just New York City or New York State.

Q. New York State.

A. Well, we could possibly get it all. There is a complication, we have sales units in New York State who service territory in Pennsylvania, and Massachusetts and Vermount.

Q. Don't they break it down as to how many turkeys are sold particularly in New York State?

A. No. See, it's only broken down by sales units, now going back to— Let me add one more thing. Going back to '56, I am not sure without looking it up, but I don't believe we even have turkeys separate at that time from Poultry, I think it was all in one poultry figure. We ordi-[fol. 490] narily—come along about the 1st of August, and we have our offices in these various units drag off the turkey volume and report it on a weekly report to us, just so we can keep track of turkeys that we sell from August 1st to the 1st of January. But without looking it up, I mean my memories hazy on it—I am not too sure that we have even a turkey figure, going back that far.

Q. How about '57? When did you start to separate turkey sales?

A. Without looking it up, I am, I couldn't tell you, but we have for the last several years—

Q. Your particular area that you can't tell from can you?

A. Not unless we have the figures separately I couldn't tell you.

Q. Well you say that, when did you start to distinguish in your figures from turkey and poultry?

A. I really don't know what year we started.

Q. Will you be able to get that, when you first started?

A. Yes, we can get that information.

[fol. 491] Q. Give us the figures anyway, the entire poultry say 1956, and if you still didn't separate 1957 up?

A. I don't think it's going to be to helpful to you because of the way we report poultry, that's fresh chickens and frozen chickens and everything else goes into poultry, see.

Q. When is the first year that you think you kept separate statistics?

A. I would say and strictly guessing, for the last four years.

Q. From '58 to '59?

A. Yes.

Q. Did you have the difference between stuffed and unstuffed?

A. No.

Q. Was it all just turkeys?

A. As soon as we started separating turkeys it's all turkeys.

Q. Now, we'll have those figures, you can give us that?

A. Oh, yes, we can get you all turkeys.

[fol. 492] Q. And did you ever come to any year where you separate the stuffed from the unstuffed?

A. No.

Q. So up to the present time you lumped it all together?

A. We still lump all those together, it's just turkeys.

Q. And did your business on turkeys increase during the years?

A. Oh, definitely; butterball turkeys I should say so.

Q. Which increased more your unstuffed or your stuffed turkeys?

A. Well, of course we were doing rather nicely on stuffed turkeys in '61, 1961.

Q. What do you mean by nicely?

A. Well, I could only give you an estimate figure of what I—what we might have done because I tell you I have no figures broken down, but I'd estimate that 1961, in this area that I outlined a little while ago, we probably were somewhere around between three and four hundred thou-[fol. 493] sand pounds of stuffed turkeys.

Q. Three hundred to four hundred thousand pounds of stuffed turkeys?

A. Yes.

Q. And how many pounds of unstuffed turkeys would you say?

A. That I can't tell you. I haven't got that figure, I really don't know. But it's available.

Q. During 1961, in New York State or in that whole area?

A. In that New York, New Jersey area. I don't have New York State. I can't break it down for you by New York State.

Q. Well, would you say that you sold more in New York then you did in the other areas?

A. I'd say New York and Philadelphia.

Q. Say New York?

A. Have been our best.

Q. Would you say that New York and Philadelphia were more than half of the rest?

A. Yes, I would say so.

Q. Say a hundred and fifty thousand would be divided between New York and Philadelphia?

[fol. 494] A. I'd say a couple of hundred thousand, I'd say that probably.

Q. Two hundred thousand?

A. I said New York would probably represent sixty-five, seventy percent.

Q. Of what, of two hundred thousand?

A. Of the three hundred and fifty thousand.

Q. So you'd say about close to two hundred thousand was New York?

A. I would say so, yes; that's a fair statement. And that's all it is.

Q. And Philadelphia would be how many?

A. I suppose Philadelphia would probably run thirty to fifty thousand somewhere in there.

Q. So a hundred thousand?

A. Thirty to fifty thousand.

Q. And the rest would go to the other states?

A. New Jersey, Connecticut, Pennsylvania.

Q. Now, of this sum in 1961 you can say you sold pretty positive, you sold about two hundred thousand pounds of stuffed turkeys?

A. In the state.

Q. State of New York?

[fol. 495] A. Is that the question. That's an estimate, yes '61, yes.

Q. And you can find out how many pounds of unstuffed turkey you sold during that period too?

A. I cannot find out what our total stuffed turkey—

Q. You subtract one from the other you can get what the unstuffed is?

A. Just an estimate.

Q. In dollars and cents, what's two hundred thousand pounds of stuffed turkey?

A. At that time I think Mr. Burke's memory is probably as good as mine. I'd say around a half a dollar was, was the going price.

Q. So about a hundred thousand dollars?

A. That's right.

Q. Worth in dollars and cents?

A. Yes.

Q. What happened in 1962?

A. Well, '62; as of April '62 we practically went out of business on stuffed turkeys in the lower part of New York, which was the big part of New York.

Q. You're talking about New York City?

A. I'm talking about New York City, Nassau, Suffolk, and Orange and Rockland Country.

[fol. 496] Q. So actually, how many what—pounds of stuffed turkey did you sell the balance of '62, what was the percentage would you say?

A. You mean in New York State?

Q. In New York State, New York State, what did it come to after say entire '62? Say from two hundred thousand pounds?

A. Again I am going to have guess, because of course one good sale was where we had our—we got into our trouble and that stopped up pretty short, I would say, imagine that we probably sold in the neighborhood of that year. I'd say seventy-five thousand pounds.

Q. Seventy-five thousand pounds?

A. That's right.

Q. For the '62—

A. That's right.

Q. And—

A. That included one good sale that where we got in trouble.

Q. So you didn't do much?

A. After that.

Q. After that sale. In other words, this was June about three months in '62, you're talking about you did most of the seventy-five thousand pounds?

[fol. 497] A. We sold some in the fall again, in upper New York State.

Q. How about the whole—how about the unstuffed turkeys for the entire year of '62, have you got that?

A. Yes, I can get you the total figures on turkeys for '62. Now, wait I can't give it to you from New York State, I can give it to you from the territory I handle.

Q. Well, would you say that the people who didn't buy stuffed turkey bought unstuffed turkey in '62?

A. Some of them. Some of them.

Q. And that it's hard to tell whether, how many did and how many didn't. You mean to say if they couldn't get a stuffed turkey they wouldn't buy any turkey at all?

A. There are some people who would buy something else.

Q. Do you know?

A. I would have no way of knowing.

Q. Do you know whether the amount of unstuffed turkey increased during the period you weren't selling stuffed turkey?

A. Yes, and we expect it to, because the population keeps [fol. 498] going up and butterballs keep going up so we expect it to increase.

Q. So, in other words, you wouldn't be missing the stuffed turkey?

A. Oh, yes; we miss it, sure, because we should have that on top of what we have got.

Q. But you don't know whether the people who bought stuffed turkey didn't buy unstuffed turkey?

A. But you don't—know that they did—they could have bought some other thing.

Q. But you don't know either way, do you—what about '63?

A. Very good year.

Q. For what?

A. But not in stuffed turkey.

Q. But a good year for unstuffed turkey?

A. Very good.

Q. Better than '61 and '62?

A. Yes, absolutely.

Q. How many pounds of stuffed turkey did you sell in '63?

A. '63, in New York State I imagine we sold about one truck load, a truck that would be about thirty thousand [fol. 499] pounds.

Q. Of stuffed—

A. Thirty thousand pounds in '63.

Q. And how many pounds of unstuffed turkey?

A. I don't know, I don't have the New York State figures.

Q. Will you get all those figures for us?

A. We could get it for you.

Q. Where did you sell this thirty thousand pounds?

A. From Orange County north.

Q. And—

A. That's from the North of Orange County I should say.

Q. Did you ever get an official notice from the Department of Agriculture that you're in violation of any law?

A. I personally did not.

Q. You know of anybody in your organization that got such an official notice?

A. Well, we got an official notice through a summons that was issued to one of our customers, I think is the only one I know about.

[fol. 500] Q. Who instituted that action?

A. Who instituted it? The Commissioner of Markets of New York as far as I know.

Q. Which New York?

A. New York City.

Q. So you said it wasn't Mr. Wickham, Commissioner Wickham that instituted this procedure?

A. I--there you'll have to understand my position a little better. Things of that kind I would not handle. Anything of that kind would come to our legal department and so any notices if there were notices would come to them. And I wouldn't—

Q. In other words, you're saying all notices would come to your legal department. Did your legal department ever tell you that they got any official notice from Commissioner Wickham, the State Commissioner of Agriculture and Markets?

A. I don't recall that they told me they had an official notice, I don't recall that they did.

Q. Would you have known if they did?

A. If they told me I would know.

Q. But you don't recall them ever telling you?

A. No, I don't.

[fol. 501] Q. And about this law suit, did you participate in this law suit?

A. I was a witness.

Q. Well, that is I mean we'll make a concession I think we ought to have a concession that this was instituted by the City, by the Commissioner or Markets of the City of New York, and not by Mr. Wickham, the Commissioner of the State of New York, is that right?

Mr. Condon: It was instituted by the City of New York.

Q. Do you know—was the investigator who made the complaint a city employee or a state employee?

A. According to what I saw at the trial, it was a city—she was an inspector for Pacetta.

Q. During the entire trial did anybody from the state, from the defendant's office participate?

A. From the defendant's office?

Q. The State Commissioner of Agriculture, & Markets?

A. Did he?

Q. Did he participate?

A. The defendant in this cause was us.

Q. I am talking about this cause, our defendant.

A. Oh.

[fol. 502] Q. Did anybody from the—we are talking about the criminal case instituted by the City of New York.

A. Against Trunz & Swift?

Q. Trunz & Swift?

A. Yes.

Q. Did anybody that was for what, violation of 193 of the Agriculture & Market Law?

A. Labeling Law, I believe.

Q. And did anybody from the State, from Mr.—Commissioner Wickham's office participate on behalf in conjunction with the City of New York?

A. Not while I was at attendance at the trial.

Q. Did you ever hear of any state official participating in this action?

A. No, I didn't.

Q. I think it will be conceded that they didn't, is that right?

Mr. Colavito: Participate?

Mr. Condon: Now, he means participate he means participate, actually take a part in the case, I think we can stipulate that they did not. The case was instituted by the [fol. 503] City of and it was prosecuted by the District Attorney of Kings County.

Q. We are referring now to a criminal proceeding instituted in one of the Courts of New York City, in 1962?

Mr. Colavito: That's right.

Mr. Kahaner: Do you remember what month this was?

Mr. Condon: It was instituted in April.

Mr. Kahaner: And came to trial in October, 1962?

Mr. Colavito: Right.

Mr. Condon: November.

Mr. Kahaner: November 1962, now this prosecution was instituted and was by the City of New York, which I understand it was an Assistant District Attorney?

Mr. Colavito: District Attorney's Office.

Mr. Kahaner: District Attorney's Office, not the Attorney General's Office?

[fol. 504] Mr. Condon: The District Attorney of Kings County prosecuted the action.

Mr. Kahaner: And the State had nothing to do with the, with the prosecution or with the conducting of the trial in any matter or form?

Mr. Colavito: That's correct, that's right.

Mr. Kahaner: You were present at that trial?

Mr. Colavito: That's right.

Q. So that the actual reason why you stopped selling in New York City was not from any notices, notifications that you got from any State authority or from Mr., Commissioner Wickham's Office, or from anybody in authority in the State Agriculture & Markets Department, but actually from what happened as a result of action taken by the Commissioner of Markets of the City of New York?

A. It all stemmed from that, however, we were pointedly told at—

Q. By whom?

A. I'll tell you in a moment, were were pointedly told [fol. 505] by the inspector of Weights & Measures for Orange County at both our Middletown and Newburgh sales units that we were not to ship any stuffed turkey to any customer out of either one of those units.

Q. Now, you're referring to Middletown and Orange County?

A. Orange County, but at our Middletown and Newburgh sales units.

Q. And these are local weights and measures people?

A. They are State people in those counties.

Q. Now, wait a second—off the record.

(Discussion off the record.)

Q. Do you know their names?

A. No, I do not.

Q. Well, if I were to tell you that they were actually local county sellers—

A. I couldn't refute it, because they didn't tell me. It went into our own sales unit.

Q. They didn't talk to you?

A. No.

Q. This is something that you got from your salesmen?

A. Our sales people called me, because I am in charge [fol. 506] of poultry sales and we had to pull the turkeys that we had in those sales units.

Q. What did these local sellers say to your people?

A. It was reported to me that they told them that it was against the laws or regulations of the State of New York to sell stuffed turkeys in New York, in the State of New York, and they'd better not ship any of them out to any of their customers.

Q. To Orange County?

A. Or we were going to be in trouble.

Q. Did they bother you from shipping those turkeys that were already in the Orange County?

A. No.

Q. Did you ever get—did you ever get visited personally by anybody from the State Department of Agriculture & Markets?

A. No.

Q. You don't—and you don't— you have no information with any state officer visiting your unit?

A. No, only—

Q. Only about these local sellers?

A. Whoever they were, yes.

Q. And did you stop sell completely, these stuffed turkeys in New York as a result of what you heard?

[fol. 507] A. Only as far north as I am telling you.

Q. In other words, you were waiting to be stopped by the local sellers of the different counties?

A. Where they didn't stop us we continued to sell stuffed turkeys.

Q. So even though they told you it was a state law you didn't stop, stop shipment or sell stuffed turkeys to the other parts of the state?

A. No, we did not.

Q. And you're still doing it?

A. We still offer them for sale.

Q. And up to the present moment they are being sold in the different parts of New York State?

A. That's correct.

Q. And have you heard, has anybody stopped you from selling them?

A. No.

Q. The stuffed turkeys?

A. Yes.

Q. And these stuffed turkeys are being sold in what part of New York State?

A. We were selling them at Syracuse, Binghamton, Elmira, Rochester, Buffalo.

[fol. 508] Q. Would you say you are selling them even today, yesterday?

A. I would imagine.

Q. And expect to sell them tomorrow?

A. I expect so. I hope we clean up what we have got.

Q. When you heard that did you check with the state to find out if there was a violation of the state law?

A. No.

Q. Did anybody from the state up to the present time serve a summons on you, on Swift & Company or any of your representatives in any of the unit offices?

A. No.

Q. Did any of your unit offices ever show you an official writing or document to the effect that you are in violation of the state law?

A. No.

Q. So as far as you know, you're not violating the state law?

A. Officially, I don't know.

Q. Would you definitely and affirmatively violate a state law, if you knew it was such a law on the books?

[fol. 509] A. Well, some question as far as I knew there was some question of interpretation and unless it was enforced we went along as we have done.

Q. You figure that the law permits you to sell your stuffed with what kind of a label?

A. We felt that we were selling our stuffed turkeys in accordance with the Department of Agriculture Label Regulations for the United States of America and we have continued to sell them in that basis unless we were stopped.

Q. In other words, you're conforming with the Federal Inspection System that the Department of Agriculture put through?

A. That's right.

Q. And you have that, and that contains what label, what weights on the label?

A. It contains a net weight including the stuffing.

Q. Just exactly what does it say? Do you know the exact weights?

A. Net weight includes weight of the stuffing.

Q. And it gives you that weight? Does it say total net weight?

A. No.

[fol. 510] Q. It just says what you just said?

A. That's right.

Q. And you feel being passed on and by the Federal Inspection, right?

A. As far as I know, I understand it has, its been approved by Washington, by the Department of Agriculture.

Q. And you feel that is sufficient, you haven't heard otherwise from any state official that you're in violation of any state law?

A. I haven't heard anything from any state official.

Q. And the only thing that you know about is that, that you know that you were convicted in New York City?

A. By the City, that's right.

Q. By an official of the City of New York?

A. That's correct.

Q. Of the Department of Weights & Measures?

A. That's correct.

Q. And that you have been told by certain local weights and measures officials in Nassau County, in Suffolk County not to sell them, and also in some upstate counties that you [fol. 511] can't?

[fol. 512] (At this point in the hearing, S. Graber relieved A. Perillo and the hearing continued as follows:)

A. I don't personally know of any official sealer going into our Mineola unit or our Nassau units that cover Nassau and Suffolk. I don't know any of them that went in there personally, but they did in Newburgh.

Q. Why did you stop selling them in Nassau and Suffolk?

A. It was all as a result of the Trunz case. The word got around that there would be action. I mean, it just got around.

Q. Did you hear anything from any official local sealer or Nassau or Suffolk?

A. I didn't.

Q. Did anybody in your company?

A. That I can't tell you.

Q. Wouldn't you know?

A. No.

Q. Was this decision to stop selling in Nassau and Suffolk just one of these discretionary things?

A. The thing is we're not going to jeopardize our customers and we sell them a lot more than stuffed turkeys and got as much publicity as this thing did in New York and the word was out that the same thing is going to prevail in Nassau and Suffolk.

Q. When you say "the word was out" this was nothing official?

[fol. 513] A. Not as far as I know, sir.

Q. Up to the present time you are not selling in Nassau and Suffolk?

A. That's correct.

Q. Did you ever contact the local sealers in Nassau and Suffolk?

A. No.

Q. To ask them if they would permit you to sell?

A. No.

Q. Did you ever contact any retailer in Nassau and Suffolk?

A. Yes, Blue Jay for example is one of our good accounts. Hills Market.

Q. What did they tell you?

A. They said we are not going to handle them because we are not going to take a chance on getting picked up.

Q. They just didn't want to take a chance?

A. That's right.

Q. No action was ever made against them by them local or state?

A. To my knowledge, no. I only know of one complaint.

Q. What is this?

A. Trunz. That's the only complaint I know of.

Q. As far as the entire State of New York that's the only complaint that you know of?

A. Yes.

Q. Do you know of any complaints instituted by the State [fol. 514] Department of Agriculture Markets against you at any time?

A. I do not know of any.

Q. Since Swift has been in business up to the present time?

A. No, sir.

Q. Did you ever get called into court by any summonses?

A. You are talking about stuffed turkeys now?

Q. Yes.

A. No.

Q. In all the years you have been selling stuffed turkeys, you never had any complaint sent to you by any officer or official of the Defendant, Commissioner Wickham of the State Department of Agriculture?

A. No, I have not.

Q. Did you ever get any publicity from him, any writings from him where he told you not to sell these stuffed turkeys?

A. No.

Q. Do you know whether he discouraged such a thing?

A. No, I couldn't tell you that.

Q. Did you ever hear of him telling people that they shouldn't buy Swift turkeys?

A. No.

Q. As a matter of fact he hadn't bothered at all, the state hadn't bothered you at all, since you stopped selling stuffed turkeys that you know of?

A. I don't know whether this Orange County thing— To [fol. 515] me that's a state thing.

Q. No, that's a local deal. Counsel will concede that.

A. If that's a local deal I don't know of any state deal.

Q. Did you ever get any information from the state telling you that the weight has to be broken up into the weight of the turkey, the actual weight of the turkey, the net weight of the turkey, the weight of the stuffing and then the total net weight?

A. I have not, no. I haven't received any notification of that.

Q. This thing that you were convicted of was under an old statute that has been amended?

A. I presume that's correct. I really don't know.

Q. At that time the question was whether poultry was meat. Was that what was one of the questions involved in that prosecution?

A. Frankly I don't know.

Q. Was it because of the fact that you didn't have the stuffed turkey marked with different weights? Was that why?

A. That's my understanding that that's what we were cited for, improper labeling under the city interpretation of the state law.

Q. You never heard any state interpretation?

A. I have not.

Q. I will read certain paragraphs, the 17th of the Plain- [fol. 516] tiffs' Amended Complaint. You let me know whether this is so or not. Do you know of your own knowledge that the Defendant has involved Section 193 of the Agriculture & Market Law of the State of New York and the quoted regulation which refers to 221-40 to require that frozen stuffed turkeys bear on its label a separate statement of the net weight of the turkey, the net weight of the stuffing and the total net weight?

A. Do I know that?

Q. Yes, were you ever notified officially that that's what he wanted?

A. I wasn't, no.

Q. Do you know whether the Defendant or any of his agents notified actual and potential wholesale and retail customers of Swift & Company that the sale of frozen stuffed turkeys whose labeling dows not comply with his said interpretation will constitute a violation of the law and will result in prosecution?

A. I couldn't give you specific instances, but our people in Orange County—

Q. Do you know?

A. No.

Q. Do you know of anybody, does your office ever receive such a communication from the state, from the defendant?

A. No.

Q. Does anybody in your office?

[fol. 517] A. Not in my office.

Q. In any other offices?

A. That I couldn't tell you.

Q. If they did, would you know?

A. Possibly.

Q. Wouldn't they notify you, something like that?

A. Legal matters very often do not reach my desk.

Q. Were you ever notified by the Swift & Company of such a—that they had received such a notice?

A. I don't recall that I was.

Q. Do you know whether the defendant has condoned and acquiesced in publicity releases furnished to newspapers within the State of New York which advised the consuming public not to buy frozen stuffed turkeys unless they bear labels stating the separate weight of the turkey, the stuffing and the total weight?

A. I would have no way of knowing that.

Q. You don't know of your own knowledge and your office doesn't have any information of that kind?

A. No.

Q. Any of your unit offices ever receive anything like that?

A. No.

Q. Did your attorneys ever tell you that such a thing was so?

A. No, I don't recall that they did.

Mr. Kahanar: I am through.

[fol. 518] /s/ H. W. Maidlow

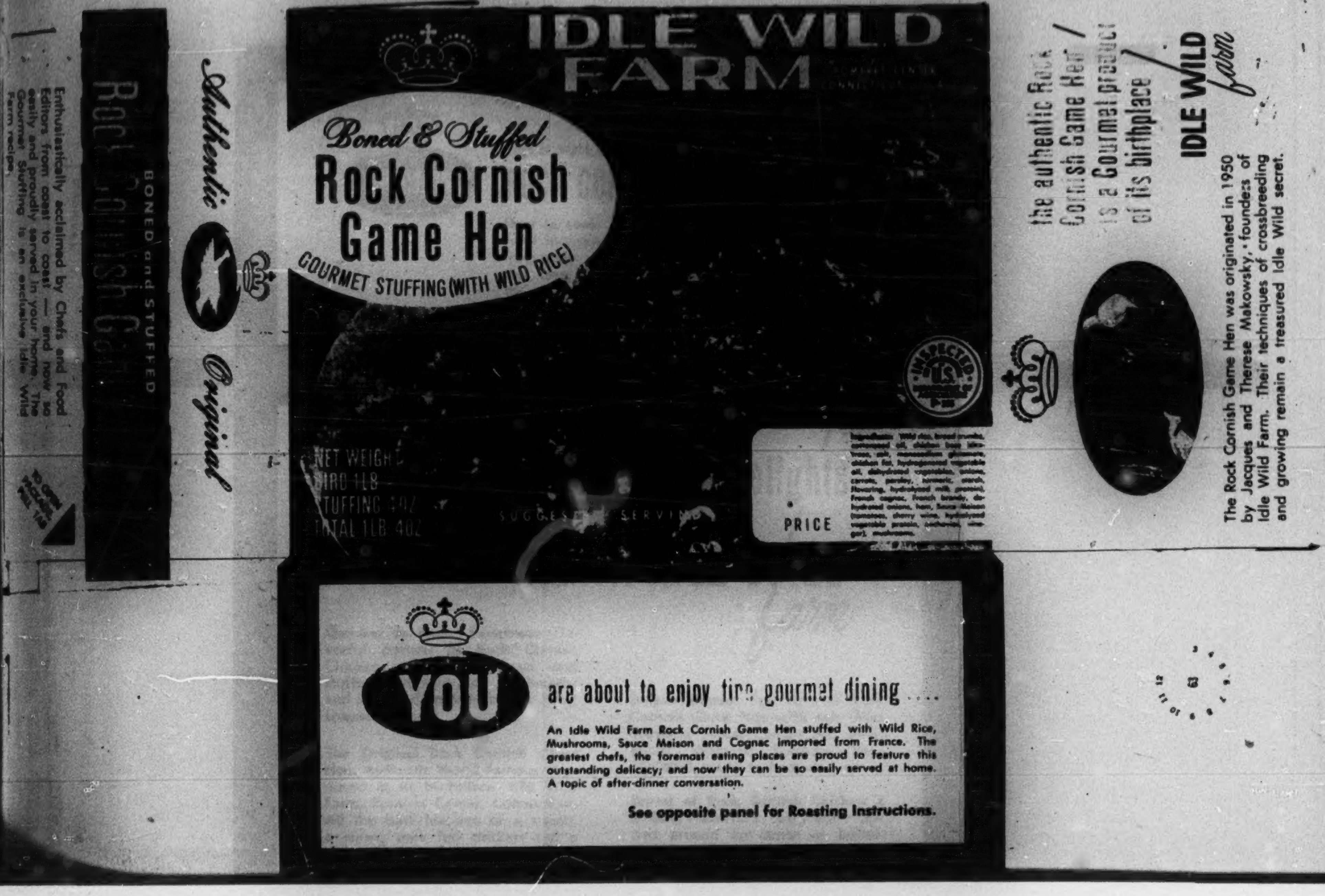
Subscribed and sworn to before me this 14th day of February, 1964.

/s/ William P. Woods
William P. Woods
Notary Public, State of New York
No. 30-9741855
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1964

(Seal)

Editors from coast to coast — and now so
easily and proudly served in your home. The

In United States District Court
For the Southern District of New York



IDLE WILD FARM

Boned & Stuffed

Rock Cornish Game Hen

GOURMET STUFFING (WITH WILD RICE)

NET WEIGHT
BIRD 1LB
STUFFING 4OZ
TOTAL 1LB 4OZ

SUGGESTED SERVING

PRICE

Authentic Original

BONED and STUFFED

Rock Cornish Game

Enthusiastically acclaimed by Chefs and Food Editors from coast to coast — and now so easily and proudly served in your home. The Gourmet Stuffing is an exclusive Idle Wild Farm recipe.

the authentic Rock Cornish Game Hen / is a Gourmet product / of its birthplace / IDLE WILD *farm*

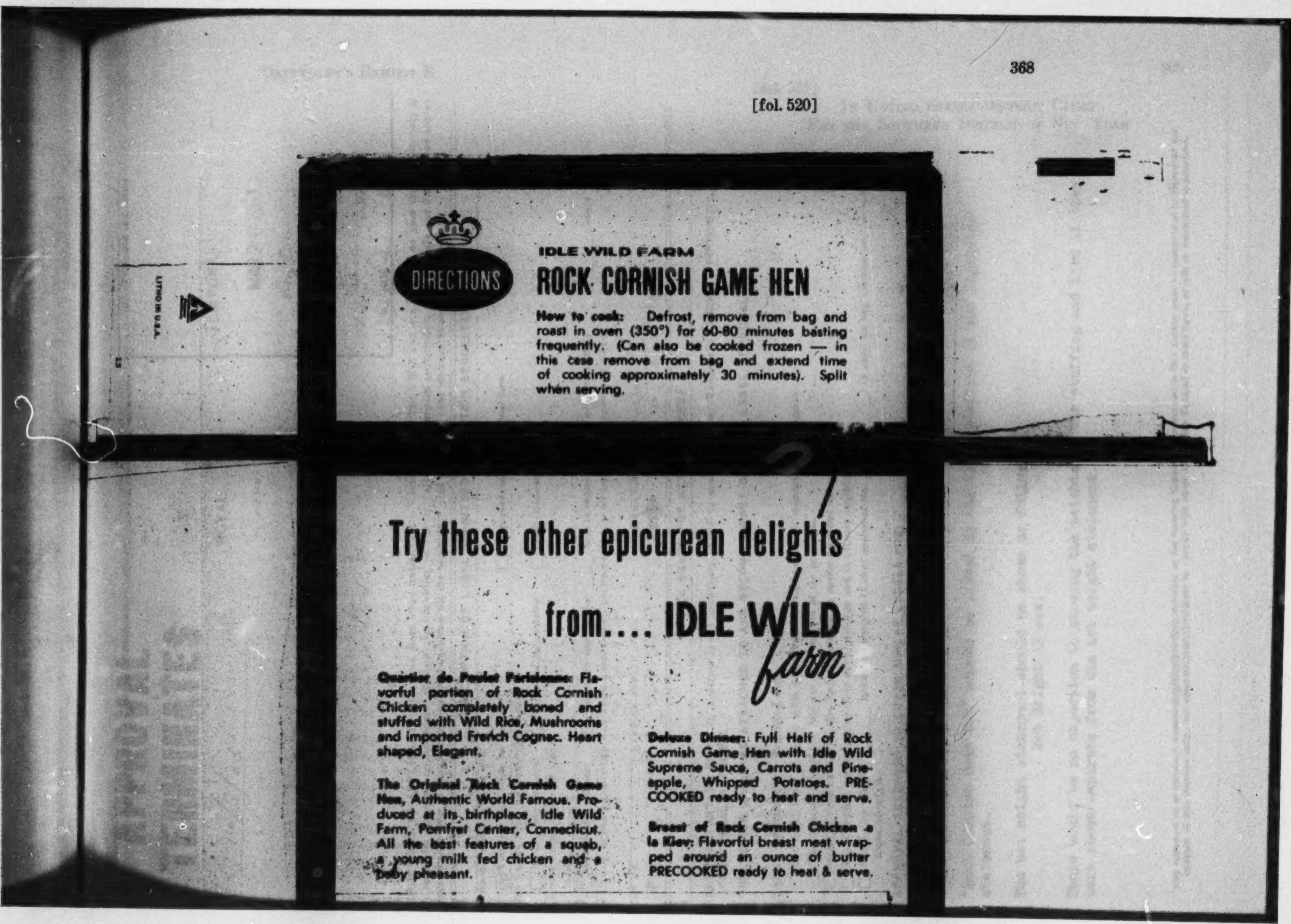
The Rock Cornish Game Hen was originated in 1950 by Jacques and Therese Makowsky, founders of Idle Wild Farm. Their techniques of crossbreeding and growing remain a treasured Idle Wild secret.

YOU are about to enjoy fine gourmet dining ....

An Idle Wild Farm Rock Cornish Game Hen stuffed with Wild Rice, Mushrooms, Sauce Maison and Cognac imported from France. The greatest chefs, the foremost eating places are proud to feature this outstanding delicacy; and now they can be so easily served at home. A topic of after-dinner conversation.

See opposite panel for Roasting Instructions.

[fol. 520]



IDLE WILD FARM

DIRECTIONS

ROCK CORNISH GAME HEN

How to cook: Defrost, remove from bag and roast in oven (350°) for 60-80 minutes basting frequently. (Can also be cooked frozen — in this case remove from bag and extend time of cooking approximately 30 minutes). Split when serving.

Try these other epicurean delights

from.... IDLE WILD *farm*

Quartier de Poulet Parisienne: Flavorful portion of Rock Cornish Chicken completely boned and stuffed with Wild Rice, Mushrooms and imported French Cognac. Heart shaped, Elegant.

The Original Rock Cornish Game Hen, Authentic World Famous. Produced at its birthplace, Idle Wild Farm, Pomfret Center, Connecticut. All the best features of a squab, a young milk fed chicken and a baby pheasant.

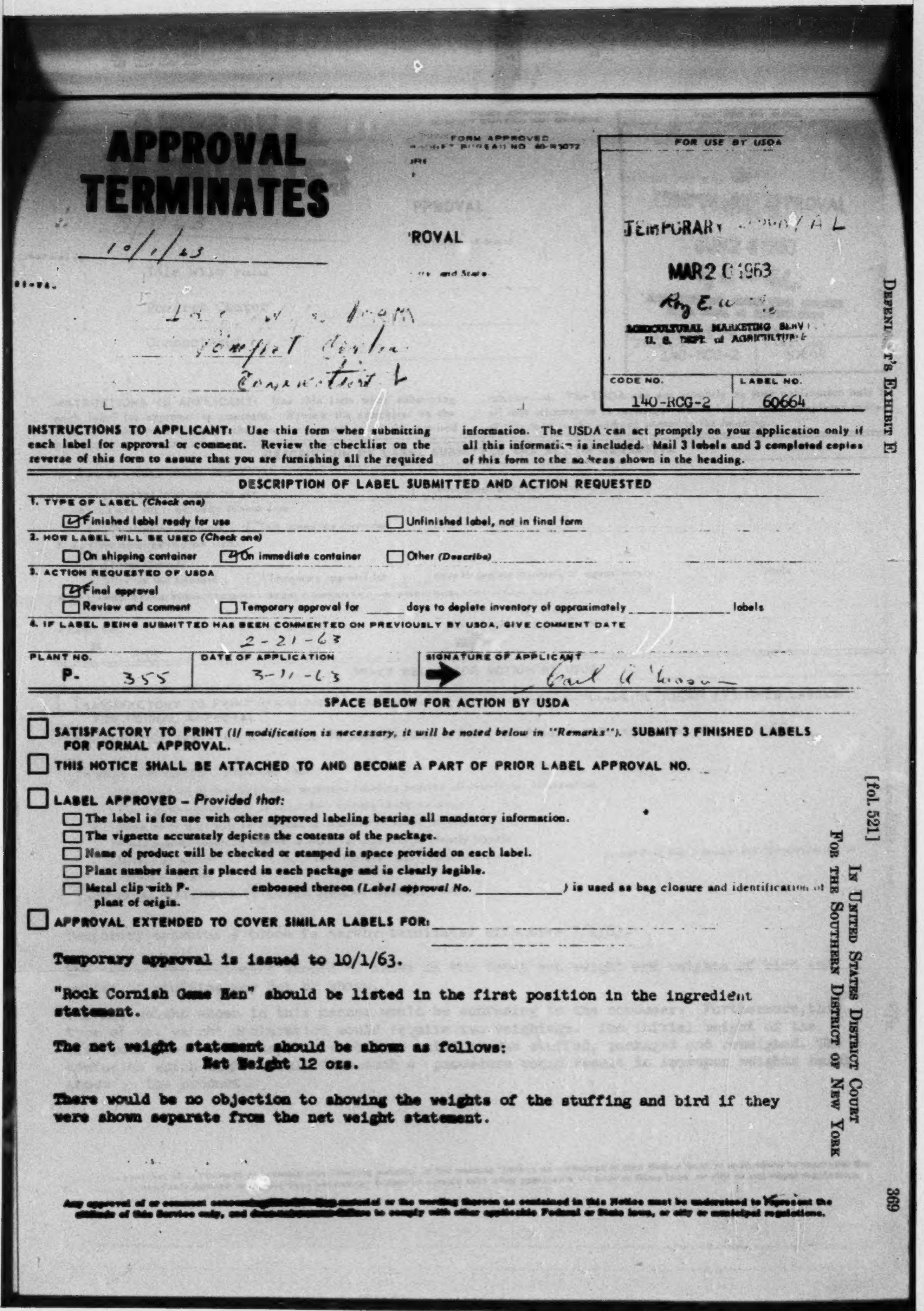
Deluxe Dinner: Full Half of Rock Cornish Game Hen with Idle Wild Supreme Sauce, Carrots and Pineapple, Whipped Potatoes. PRECOOKED ready to heat and serve.

Breast of Rock Cornish Chicken a la Kiev: Flavorful breast meat wrapped around an ounce of butter PRECOOKED ready to heat & serve.

DEFENDANT'S EXHIBIT E

[fol. 521]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK



APPROVAL TERMINATES
10/1/63

FORM APPROVED
BUDGET BUREAU NO. 40-R3072

'ROVAL

[illegible] from
Pomfret Center
Connecticut

FOR USE BY USDA
TEMPORARY APPROVAL
MAR 20 1963
Roy E. [illegible]
AGRICULTURAL MARKETING SERVICE
U. S. DEPT. of AGRICULTURE

CODE NO.	LABEL NO.
140-RCG-2	60664

INSTRUCTIONS TO APPLICANT: Use this form when submitting each label for approval or comment. Review the checklist on the reverse of this form to assure that you are furnishing all the required information. The USDA can act promptly on your application only if all this information is included. Mail 3 labels and 3 completed copies of this form to the address shown in the heading.

DESCRIPTION OF LABEL SUBMITTED AND ACTION REQUESTED

1. TYPE OF LABEL (Check one)
☑ Finished label ready for use ☐ Unfinished label, not in final form

2. HOW LABEL WILL BE USED (Check one)
☐ On shipping container ☑ On immediate container ☐ Other (Describe) ______

3. ACTION REQUESTED OF USDA
☑ Final approval
☐ Review and comment ☐ Temporary approval for ____ days to deplete inventory of approximately ________ labels

4. IF LABEL BEING SUBMITTED HAS BEEN COMMENTED ON PREVIOUSLY BY USDA, GIVE COMMENT DATE
2-21-63

PLANT NO.	DATE OF APPLICATION	SIGNATURE OF APPLICANT
P- 355	3-11-63	Carl A. [illegible]

SPACE BELOW FOR ACTION BY USDA

☐ SATISFACTORY TO PRINT *(If modification is necessary, it will be noted below in "Remarks").* SUBMIT 3 FINISHED LABELS FOR FORMAL APPROVAL.

☐ THIS NOTICE SHALL BE ATTACHED TO AND BECOME A PART OF PRIOR LABEL APPROVAL NO. __

☐ LABEL APPROVED – *Provided that:*
- ☐ The label is for use with other approved labeling bearing all mandatory information.
- ☐ The vignette accurately depicts the contents of the package.
- ☐ Name of product will be checked or stamped in space provided on each label.
- ☐ Plant number insert is placed in each package and is clearly legible.
- ☐ Metal clip with P-________ embossed thereon *(Label approval No.* ________*)* is used as bag closure and identification of plant of origin.

☐ APPROVAL EXTENDED TO COVER SIMILAR LABELS FOR: ________

Temporary approval is issued to 10/1/63.

"Rock Cornish Game Hen" should be listed in the first position in the ingredient statement.

The net weight statement should be shown as follows:
Net Weight 12 ozs.

There would be no objection to showing the weights of the stuffing and bird if they were shown separate from the net weight statement.

Any approval of or comment concerning [illegible] material or the wording thereon as contained in this Notice must be understood to represent the attitude of this Service only, and [illegible] failure to comply with other applicable Federal or State laws, or city or municipal regulations.

APPROVAL TERMINATES

7/1/63

BUDGET BUREAU NO. 40-R3072

PPROVAL

FOR USE BY USDA

TEMPORARY APPROVAL

JUN 24 1963

CODE NO. 140-RCG-2

LABEL NO. 60664

(Name, City, and State)

Idle Wild Farm

Pomfret Center

Connecticut

INSTRUCTIONS TO APPLICANT: Use this form when submitting each label for approval or comment. Review the checklist on the reverse of this form to assure that you are furnishing all the required information. The USDA can act promptly on your application only if all this information is included. Mail 3 labels and 3 completed copies of this form to the address shown in the heading.

DESCRIPTION OF LABEL SUBMITTED AND ACTION REQUESTED

1. TYPE OF LABEL *(Check one)*
   - ☐ Finished label ready for use
   - ☐ Unfinished label, not in final form
2. HOW LABEL WILL BE USED *(Check one)*
   - ☐ On shipping container
   - ☐ On immediate container
   - ☐ Other *(Describe)* ______
3. ACTION REQUESTED OF USDA
   - ☐ Final approval
   - ☐ Review and comment
   - ☐ Temporary approval for ______ days to deplete inventory of approximately ______ labels
4. IF LABEL BEING SUBMITTED HAS BEEN COMMENTED ON PREVIOUSLY BY USDA, GIVE COMMENT DATE

PLANT NO.	DATE OF APPLICATION	SIGNATURE OF APPLICANT
P. 355		

SPACE BELOW FOR ACTION BY USDA

☐ **SATISFACTORY TO PRINT** *(If modification is necessary, it will be noted below in "Remarks").* **SUBMIT 3 FINISHED LABELS FOR FORMAL APPROVAL.**

☒ **THIS NOTICE SHALL BE ATTACHED TO AND BECOME A PART OF PRIOR LABEL APPROVAL NO.** 60664

☐ **LABEL APPROVED** – *Provided that:*
- ☐ The label is for use with other approved labeling bearing all mandatory information.
- ☐ The vignette accurately depicts the contents of the package
- ☐ Name of product will be checked or stamped in space provided on each label.
- ☐ Plant number insert is placed in each package and is clearly legible.
- ☐ Metal clip with P. ______ embossed thereon (*Label approval No.* ______) is used as bag closure and identification of plant of origin.

☐ **APPROVAL EXTENDED TO COVER SIMILAR LABELS FOR:**

Temporary approval # 60664 is hereby terminated effective 7/1/63.

The net weight statement should be shown as the total net weight and weights of bird and weight of stuffing may not be shown.

The net weight shown in this manner would be confusing to the consumer. Furthermore, this type of net weight declaration would require two weighings. The initial weight of the bird would have to be kept on each bird until it was stuffed, packaged and reweighed. The confusion which might result from such a procedure could result in improper weights being shown on the product.

... approval of or comment concerning this labeling material or the wording thereon as contained in this Notice must be understood to represent the attitude of this Service only, and does not excuse failure to comply with other applicable Federal or State laws, or city or municipal regulations.

APPROVAL TERMINATES

2·29·64

FORM APPROVED
BUDGET BUREAU NO. 40-R3072

'OVAL

IDLE WILD FARM, INC.
POMFRET CENTER
CONNECTICUT

FOR USE BY USDA

TEMPORARY APPROVAL

AUG 23 1963

Ray E W

AGRICULTURAL MARKETING SERVICE
U. S. DEPT of AGRICULTURE

CODE NO. 140-RCG

LABEL NO 65336

INSTRUCTIONS TO APPLICANT: Use this form when submitting each label for approval or comment. Review the checklist on the reverse of this form to assure that you are furnishing all the required information. The USDA can act promptly on your application if all this information is included. Mail 3 labels and 3 completed copies of this form to the address shown in the heading.

DESCRIPTION OF LABEL SUBMITTED AND ACTION REQUESTED

1. TYPE OF LABEL *(Check one)*
   - ☑ Finished label ready for use
   - ☐ Unfinished label, not in final form
2. HOW LABEL WILL BE USED *(Check one)*
   - ☐ On shipping container
   - ☑ On immediate container
   - ☐ Other *(Describe)* ____________
3. ACTION REQUESTED OF USDA
   - ☐ Final approval
   - ☐ Review and comment
   - ☑ Temporary approval for 180 days to deplete inventory of approximately 25122 labels
4. IF LABEL BEING SUBMITTED HAS BEEN COMMENTED ON PREVIOUSLY BY USDA, GIVE COMMENT DATE 6/24/63

PLANT NO.	DATE OF APPLICATION	SIGNATURE OF APPLICANT
P- 355	8/16/63	Carl A Mason

SPACE BELOW FOR ACTION BY USDA

☐ SATISFACTORY TO PRINT *(If modification is necessary, it will be noted below in "Remarks")*. SUBMIT 3 FINISHED LABELS FOR FORMAL APPROVAL.

☐ THIS NOTICE SHALL BE ATTACHED TO AND BECOME A PART OF PRIOR LABEL APPROVAL NO. ______

☐ LABEL APPROVED – *Provided that:*
- ☐ The label is for use with other approved labeling bearing all mandatory information.
- ☐ The vignette accurately depicts the contents of the package.
- ☐ Name of product will be checked or stamped in space provided on each label.
- ☐ Plant number insert is placed in each package and is clearly legible.
- ☐ Metal clip with P-________ embossed thereon *(Label approval No. ____________)* is used as bag closure and identification of plant of origin.

☐ APPROVAL EXTENDED TO COVER SIMILAR LABELS FOR: ______________________

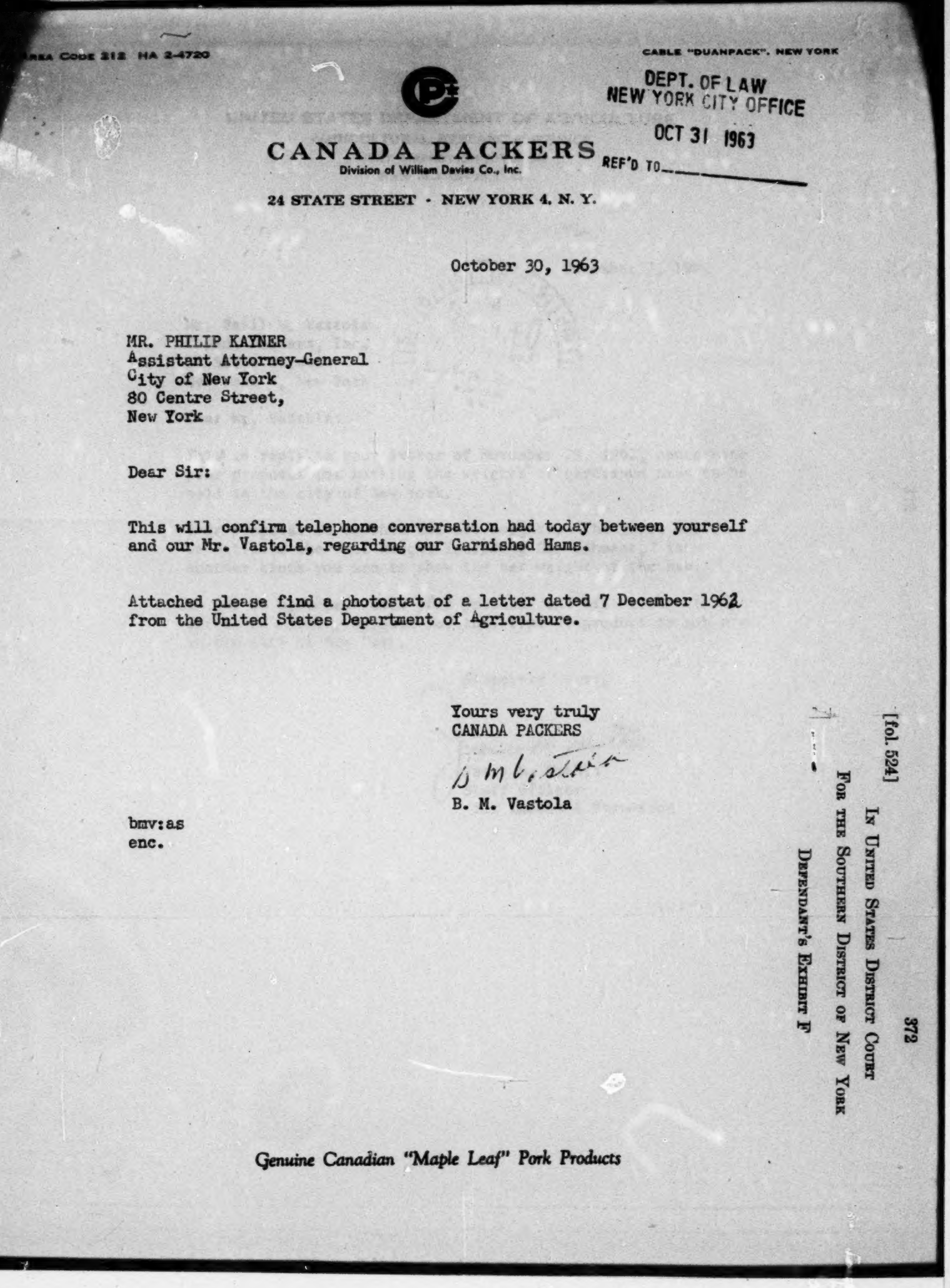
Temporary approval is issued to 2/29/64, as requested.

Any approval of or comment concerning [illegible] material or the wording thereon as contained in this Notice must be understood to represent the attitude of this Service only, and [illegible] failure to comply with other applicable Federal or State laws, or city or municipal regulations.

[fol. 524]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT'S EXHIBIT F



REA CODE 212 HA 2-4720

CABLE "DUANPACK", NEW YORK

CANADA PACKERS
Division of William Davies Co., Inc.
24 STATE STREET · NEW YORK 4, N. Y.

DEPT. OF LAW
NEW YORK CITY OFFICE
OCT 31 1963
REF'D TO

October 30, 1963

MR. PHILIP KAYNER
Assistant Attorney-General
City of New York
80 Centre Street,
New York

Dear Sir:

This will confirm telephone conversation had today between yourself and our Mr. Vastola, regarding our Garnished Hams.

Attached please find a photostat of a letter dated 7 December 1962 from the United States Department of Agriculture.

Yours very truly
CANADA PACKERS

B M Vastola

B. M. Vastola

bmv:as
enc.

Genuine Canadian "Maple Leaf" Pork Products

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL RESEARCH SERVICE
MEAT INSPECTION DIVISION
WASHINGTON 25, D. C.

YL-

December 7, 1962

RECEIVED
DEC 10 1962

Mr. Basil M. Vastola
Canada Packers, Inc.
24 State Street
New York 4, New York

Dear Mr. Vastola:

This in reply to your letter of November 29, 1962, concerning your proposal for marking the weights of garnished hams to be sold in the city of New York.

Your proposal is to show two net weights. The first was to be entitled the "Net Weight Including Garnishment," in another block you are to show the net weight of the ham.

We are in agreement with your proposal and will accept this method of marking weights for this type of product to marketed in the city of New York.

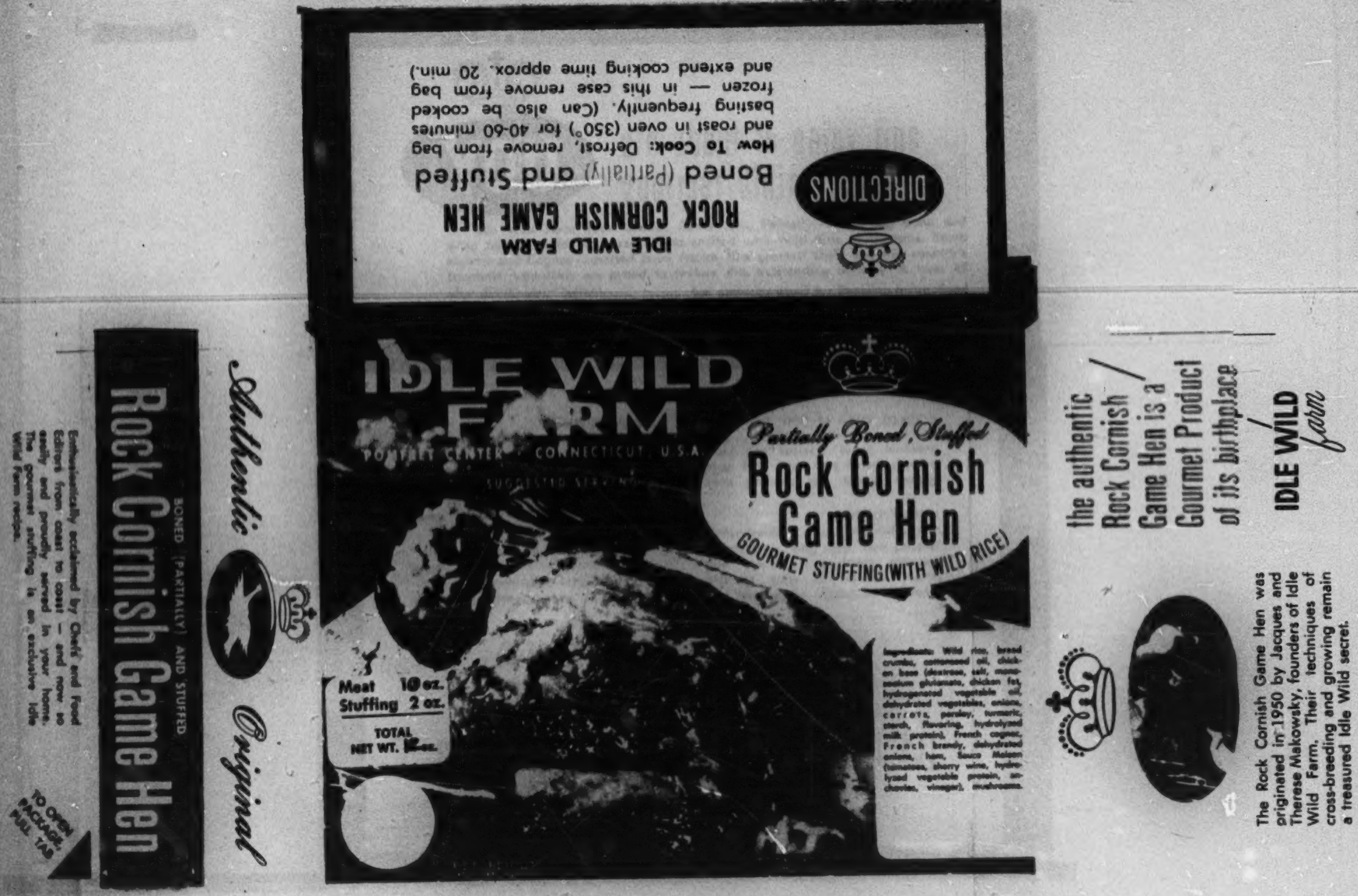
Sincerely yours,

James M. Mathis

James M. Mathis
Staff Officer
for Labels & Standards

DEFENDANT'S EXHIBIT G

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



DIRECTIONS

IDLE WILD FARM
ROCK CORNISH GAME HEN
Boned (Partially) and Stuffed

How To Cook: Defrost, remove from bag and roast in oven (350°) for 40-60 minutes basting frequently. (Can also be cooked frozen — in this case remove from bag and extend cooking time approx. 20 min.)

Authentic Original

Rock Cornish Game Hen

BONED (PARTIALLY) AND STUFFED

Enthusiastically acclaimed by Chefs and Food Editors from coast to coast — and now so easily and proudly served in your home. The gourmet stuffing is an exclusive Idle Wild Farm recipe.

TO OPEN PACKAGE PULL TAB

IDLE WILD FARM
POMFRET CENTER · CONNECTICUT, U.S.A.
SUGGESTED SERVING

Partially Boned, Stuffed
Rock Cornish Game Hen
GOURMET STUFFING (WITH WILD RICE)

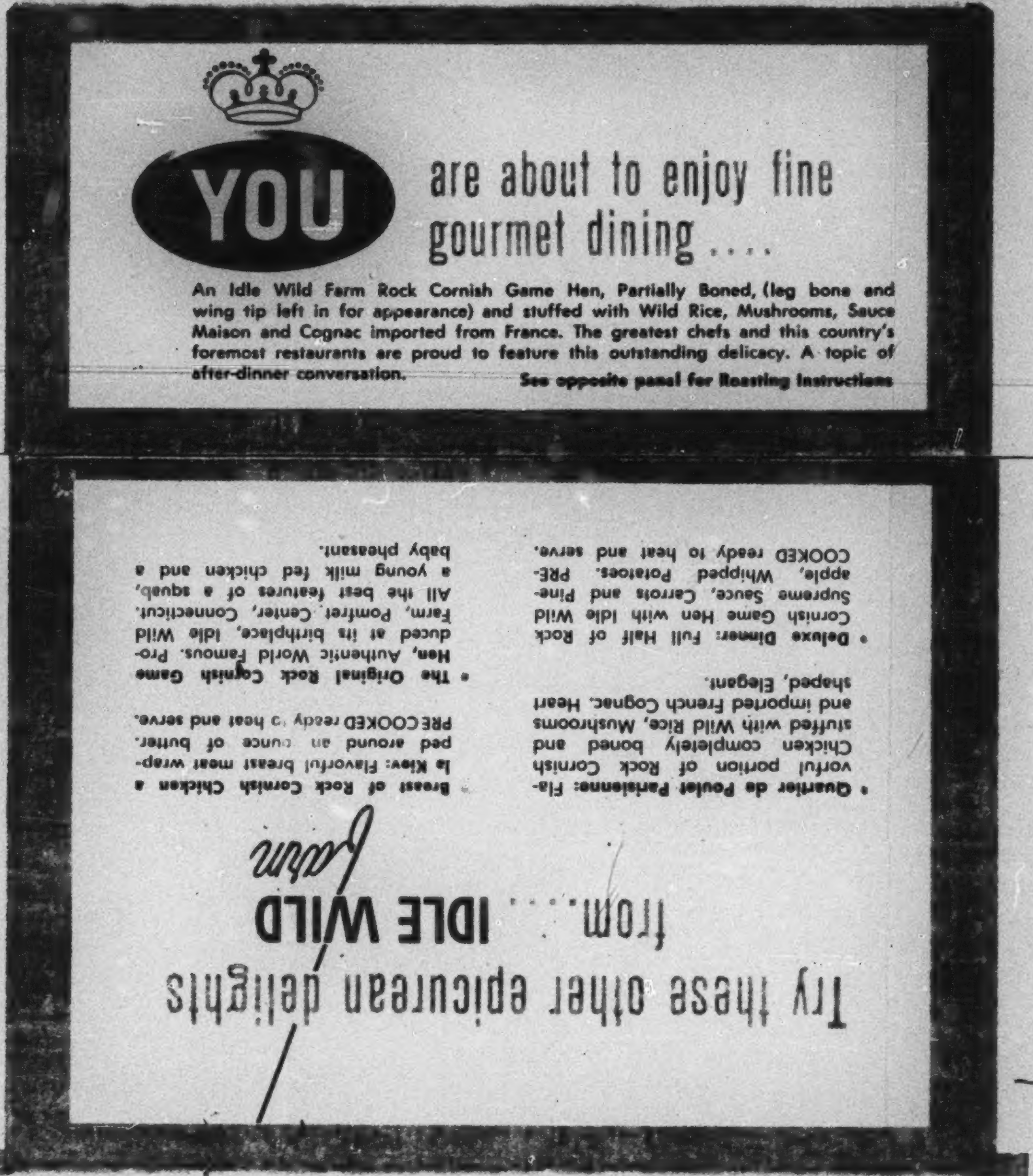
Meat 10 oz.
Stuffing 2 oz.
TOTAL NET WT. 12 oz.

Ingredients: Wild rice, bread crumbs, cottonseed oil, chicken base (dextrose, salt, monosodium glutamate, chicken fat, hydrogenated vegetable oil, dehydrated vegetables, onions, carrots, parsley, turmeric, starch, flavoring, hydrolyzed milk protein), French cognac, French brandy, dehydrated onions, ham, Sauce Maison (tomatoes, sherry wine, hydrolyzed vegetable protein, anchovies, vinegar), mushrooms.

the authentic Rock Cornish Game Hen is a Gourmet Product of its birthplace

IDLE WILD *farm*

The Rock Cornish Game Hen was originated in 1950 by Jacques and Therese Makowsky, founders of Idle Wild Farm. Their techniques of cross-breeding and growing remain a treasured Idle Wild secret.



YOU are about to enjoy fine gourmet dining....

An Idle Wild Farm Rock Cornish Game Hen, Partially Boned, (leg bone and wing tip left in for appearance) and stuffed with Wild Rice, Mushrooms, Sauce Maison and Cognac imported from France. The greatest chefs and this country's foremost restaurants are proud to feature this outstanding delicacy. A topic of after-dinner conversation.

See opposite panel for Roasting Instructions

Try these other epicurean delights from.... **IDLE WILD** *farm*

- **Quartier de Poulet Parisienne:** Flavorful portion of Rock Cornish Chicken completely boned and stuffed with Wild Rice, Mushrooms and imported French Cognac. Heart shaped, Elegant.
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- **The Original Rock Cornish Game Hen,** Authentic World Famous. Produced at its birthplace, Idle Wild Farm, Pomfret Center, Connecticut. All the best features of a squab, a young milk fed chicken and a baby pheasant.

[fol. 527a] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

63 Civil 3085

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,
Plaintiffs,

v.

DON J. WICKHAM, Commissioner of Agriculture and
Markets of the State of New York, Defendant.

Before FRIENDLY, Circuit Judge, CROAKE and WYATT, District Judges.

Action by packers of frozen stuffed turkeys processed outside New York State for declaratory judgment affirming their right to sell in New York for resale turkeys labelled as to weight in a manner satisfying the requirements of the United States Department of Agriculture, and seeking to enjoin the New York Commissioner of Agriculture and Markets from interfering with such sales by reason of New York's weight labelling requirements.

William J. Condon, New York, New York, (William J. Colavito on brief), for Swift & Company, Inc.

E. Gordon Robbins (Evans, Orr, Gourlay & Pacelli, New York, New York), for Armour and Company.

Philip Kahaner and Lester Esterman (Louis J. Lefkowitz, Attorney General for the State of New York), for the State of New York.

[fol. 528]

Opinion—June 10, 1964

Friendly, Circuit Judge:

Swift & Co. and Armour & Co. pack frozen stuffed turkeys in Minnesota and Wisconsin. They ship the turkeys into New York for sale to retailers who resell them to consumers. The turkeys are labelled so as to show the total weight of the stuffed bird, as required by the United States Department of Agriculture. The packers have brought this action against the Commissioner of Agriculture and Markets of New York seeking a declaration of their right to sell turkeys in New York under the federally approved label and an injunction against the New York Commissioner's interfering with such sales by enforcing § 193 of New York's Agriculture and Markets Law and regulations issued thereunder which he construes as requiring a statement of the net weight of the unstuffed turkeys as well as of the stuffed birds—a statement which the plaintiffs contend would not be federally approved or allowed.

The complaint alleged that § 193 of the Agriculture and Markets Law and action threatened by the Commissioner under it violated the plaintiffs' rights under the commerce and supremacy clauses of the Federal Constitution and the due process and equal protection clauses of the Fourteenth Amendment. Plaintiffs requested that a three-judge court be called to hear and determine the case pursuant to 28 U.S.C. § 2281. Believing that the case might be within that section, Judge Croake, to whom the application came, caused such a court to be assembled as provided in 28 U.S.C. § 2284. For reasons that will later appear, we think [fol. 529] it best to take what might seem the unorthodox course of discussing the merits before we address ourselves to the puzzling question, which the parties have not disputed, whether the case is appropriate for a three-judge court under § 2281.

Section 193-3 of New York's Agriculture and Markets Law provides:

> "All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the Commissioner."

When the action was brought, the relevant regulation, § 221.40, stated:

> "Meat, poultry and fish shall be sold or offered for sale as food at retail by net weight only."[1]

Neither the statute nor the regulation defines "net weight". The Director of the Bureau of Weights and Measures of the Department testified that he interpreted the regulation, as applied to stuffed turkeys, to require statement of the net weight both of the unstuffed and of the stuffed bird, and that, when asked, he so advised local sealers of weights and measures.

The history of the regulation, promulgated after a hearing by the Commissioner to consider an alternative containing an exception "that stuffed poultry, when plainly labeled as such and with the words 'including stuffing' appearing as part of the net weight marking of the combined poultry and stuffing may be sold or offered for sale by the net weight of the combined poultry and stuffing", leaves little doubt that this was an admissible interpretation of the regulation. We are also confident that, in view [fol. 530] of the lack of statutory definition of "net weight", the New York courts would hold a regulation having this effect to be within the authority conferred on the Commissioner specifically by § 193-3 and more generally by § 196-a. See Mounting & Finishing Co. v. McGoldrick, 294 N.Y. 104 (1945). We further hold that the state has taken and has threatened to take action that will prevent the sale of plaintiffs' turkeys unless they comply with the regulation as so interpreted, overruling the state's unpersuasive contention that plaintiffs have been the victims of uncoordinated but uniform acts by a number of local sealers.

Plaintiffs now weigh the turkeys at their packing plants outside New York after stuffing and immediately before freezing. They do not deny they can adjust their operation so as to comply with the New York regulation as interpreted by the Commissioner, although this would allegedly involve a total of three weighings—one before stuffing, one after, and another when the giblets have been added and the completed product is placed in a Cryovac bag. Swift's witness testified that 200 birds can be weighed per hour; Armour weighs 300. Two additional weighings would thus take Armour somewhat less and Swift somewhat more than a half minute per bird.[2] Since the birds are frozen immediately after the weighing, there would seem to be no difficulty in plaintiffs' making the extra weighings and affixing the added labels only for the approximate quantity intended for shipment to New York; in any event the record contains nothing to show this would not be practicable.

[fol. 531] I.

The contention that New York's regulation is rendered invalid by the commerce clause alone is not substantial. The Commissioner showed that the stuffing constitutes a considerable portion of the net weight of the stuffed bird and also that there can be significant variations in the weight of stuffing in birds of the same size, even when the processing is done by such reputable packers as the plaintiffs and *a fortiori* when it is not. Hence a label showing only the net weight of the stuffed bird may not fully inform the buyer what he is getting. Protection of the public against false weights and measures or misleading statements about them is one of the oldest exercises of governmental regulatory power. "The control of weights and measures appears in the Anglo-Saxon laws, and in legislation during the next thousand years." Plucknett, A Concise History of the Common Law (1956), 448 fn. 2. The barons of the 13th century considered the subject sufficiently important for mention in the 35th Chapter of Magna Carta.[3] A weighing house where goods brought into and out of the city of New Amsterdam "subject to the measure either of the Skepel or Weight" must be weighed and measured "by the sworn Weighmaster and Measurer," see O'Callaghan, Laws and Ordinances of New Netherland, 174-75 (1868), was established in 1654; the local New York sealers, of whose activities Swift and Armour complain, can be traced back to the Act of June 19, 1703, Laws of the Colony of New York, 554.

That the framers of the Constitution did not intend that laws of such ancient vintage in New York and other states' [fol. 532] must yield to an unexercised national authority in the case of goods coming from outside the state is obvious from the mere statement. But the point is further demonstrated by the provision in Article I, § 10, that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports and Exports, except what may be absolutely necessary for executing its inspection Laws . . . "—a provision as to which The Federalist thought it enough to say "that the manner in which the restraint is qualified, seems well calculated at once to secure to the States a reasonable discretion in providing for the conveniency of their imports and exports; and to the United States a reasonable check against the abuse of this discretion." The Federalist No. 44. There could hardly be a fitter subject for state inspection than weights, see Patapsco Guano Co. v. Board of Agriculture of North Carolina, 171 U.S. 345, 358, 361 (1898), and the same principle that permits a state to prohibit the sale of articles bearing an improper statement as to weight allows it to insist on statements that it reasonably considers to be proper. It is in no way fatal to a regulation of this sort, which does not operate so as to favor local competitors, that compliance may require out-of-state manufacturers to alter their processes, when this is not unduly burdensome. The *Patapsco* case and Savage v. Jones, 225 U.S. 501 (1912), are sufficient authority. The claims under the Fourteenth Amendment are so patently baseless that we mention them only to show they were not overlooked.

[fol. 533]

II.

In contrast to the lack of merit in plaintiffs' contentions that New York's requirements violate these constitutional provisions, their argument that the Supremacy Clause forbids enforcement of New York's regulation because of the federal Poultry Products Inspection Act of 1957, 21 U.S.C. §§ 451-469, 71 Stat. 441-49, raises most serious issues, to which we now turn.

The Act contains an initial section, 21 U.S.C. § 451, making legislative findings as to the national interest in favor of wholesome poultry products and against unwholesome or adulterated ones, as to the impracticability of inspecting poultry and poultry products that enter into the stream of interstate commerce without also inspecting all poultry and poultry products processed in the same establishment, and as to the importance of protecting "interstate commerce in poultry and poultry products inspected for wholesomeness, from being adversely burdened, obstructed, or affected by uninspected poultry or poultry products" in large metropolitan markets. The second section, 21 U.S.C. § 452, declares it "to be the policy of Congress to provide for the inspection of poultry and poultry products by the inspection service as herein provided to prevent the movement in interstate or foreign commerce or in a designated major consuming area of poultry products which are unwholesome, adulterated, or otherwise unfit for human food." The following sections, 21 U.S.C. §§ 453-456, contain definitions, authorize the designation of major consuming areas within which [fol. 534] federal controls will govern local as well as interstate commerce in poultry, and provide for inspection of carcasses and of the premises themselves.

The next two sections, 21 U.S.C. §§ 457 and 458, contain the provisions on which plaintiffs particularly rely. Section 457, entitled "Labeling" provides:

> "(a) *Requirements for shipping and immediate containers.*
>
> . . . Each immediate container of any poultry product inspected under the authority of this chapter and found

to be wholesome and not adulterated shall at the time such product leaves the official establishment bear, in addition to the official inspection mark, in distinctly legible form, the name of the product, a statement of ingredients if fabricated from two or more ingredients including a declaration as to artificial flavors, colors, or preservatives, if any, the net weight or other appropriate measure of the contents, the name and address of the processor and the approved plant number of the official establishment in which the contents were processed. * * * The Secretary may permit reasonable variations and grant exemptions from the foregoing labelling requirements in any manner not in conflict with the purposes of this chapter.

"(b) *False or misleading labeling.*

The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this chapter or the container thereof which is false or misleading in any particular is prohibited. No poultry products inspected or required to be inspected pursuant to the provisions of this chapter shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Secretary, he may request a hearing, but the use of the label shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless within thirty days after the receipt of notice of such final determination the person adversely affected thereby appeals to the United States court of appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit."

Section 458 prohibits various acts, including:

> "(c) Falsely making or issuing, altering, forging, simulating, or counterfeiting any official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, used in connection with the inspection of poultry or poultry products under this chapter, or causing, procuring, aiding, assisting in, or being a party to, such false making, issuing, altering, forging, simulating, or counterfeiting, or knowingly possessing, without promptly notifying the Secretary of Agriculture or his representative, uttering, publishing, or using as true, or causing to be uttered, published, or used as true, any such falsely made or issued, altered, forged, simulated, or counterfeited official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, or representing that any poultry or poultry product has been officially inspected under the authority of this chapter when such poultry or poultry product has in fact not been so inspected.
>
> "(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product."

Pursuant to 21 U.S.C. § 463, the Secretary of Agriculture has issued regulations to carry out the Poultry Inspection Act, the most pertinent of which we quote in the margin.[5] It is undisputed that the Administrator has approved labels for plaintiffs' frozen stuffed turkeys which show only the net weight of the stuffed bird. In May, 1963, Swift sought approval of a "revised net weight statement showing separate weight for turkey, dressing and total weight." The Head of the Poultry Products Section, Inspection [fol. 536] Branch, Poultry Division, returned the proposed labels with adverse comments. A letter amplified the reasons. These included the impracticability of the consumer's verifying the separate net weights due to absorption of juices by the dressing during defrosting, the possibility that the weight slip attached to the bird at the first weighing might become detached so that wrong weights might be shown, and the danger of bacterial contamination during the time needed for the added weighings. An application by Armour for approval of a label showing separately the net weight of the turkey and of the stuffing but without a total was returned with the comment "The net weight of the poultry product including the stuffing must be shown in lieu of separate net weights." Neither Swift nor Armour requested a hearing as permitted by the statute and the regulations.

A.

We must first consider whether by the mere enactment of the Poultry Inspection Act, Congress so "occupied the field" as to oust all weight regulation by states into which federally inspected poultry or poultry products are shipped, irrespective of the consistency of the state and the federal regulation. Some illumination is afforded by a series of cases that arose shortly after enactment of the Pure Food and Drug Act. The first, *Savage* v. *Jones, supra,* held that the provisions of § 8 prohibiting a package or label that contained false or misleading statements of the contents, 34 Stat. 768, 770 (1906), did not invalidate a state statute requiring a tag or label affirmatively disclosing the ingredi- [fol. 537] ents. In contrast, at the next term, the Court decided that when the Secretaries of the Treasury, of Agriculture and of Commerce and Labor, had found that a syrup was not misbranded if labelled "corn syrup with cane flavor", a state could not require cans of the syrup sold at retail to be labelled instead "Glucose flavored with Refiner's Syrup." McDermott v. Wisconsin, 228 U.S. 115 (1913); the Court had no occasion to consider whether the state might require this as an additional label. The trilogy was completed by Corn Products Refining Co. v. Eddy, 249 U.S. 427 (1919), holding that federal approval of labelling as corn syrup did not prevent a state from requiring that the cans also bear a statement of ingredients.

Multiplication of references to Supreme Court decisions in this general area would serve no useful purpose; it suffices for the present to cite the last bracketing pair, both decided by the narrowest of margins. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), sustained California's prohibition of the sale of avocados containing less than 8% of oil by weight, as applied to Florida avocados whose maturity on picking was already controlled by compliance with regulations promulgated by the Secretary of Agriculture with special reference to Florida avocados, and which were certified by a Federal-State Inspection Service pursuant to regulations issued by the Secretary under the Agricultural Adjustment Act, 7 U.S.C. §§ 601 et seq., 48 Stat. 31 (1933). The Court reaffirmed that "The principle to be derived from our decisions is that federal regulation of a field of commerce should not [fol. 538] be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." 373 U.S. at 142. As against this Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942), had prohibited Alabama from seizing packing stock butter, not meeting the state standard, which had been acquired by an Alabama processor for use in manufacturing renovated butter for transportation in interstate commerce under federal regulations, Internal Revenue Code of 1939, §§ 2320-27, 53 Stat. 252. The *Florida Avocado Growers* majority distinguished *Cloverleaf* on the basis that "Congressional regulation of one end of the stream of commerce does not, ipso facto, oust all state regulation at the other end," 373 U.S. at 145, and pointed to the difference recognized in *Cloverleaf* "between a confiscation which interferes with production under federal supervision and confiscation after production because of a higher standard demanded by a state for its consumers. The latter type is permissible under all the authorities." 315 U.S. at 162.[6] This distinction necessarily recognizes that it is not inevitably unconstitutional for a state desiring "a higher standard" for the protection of its consumers to confront a manufacturer in another state with the alternatives of taking steps not required by applicable federal law or not selling his goods in the enacting state.

The general scheme of the Poultry Products Inspection Act does not suggest a Congressional purpose to create an [fol. 539] exclusive system of regulation of the marketing of poultry; in particular it does not suggest an intent to oust the states of their historic undertaking to safeguard their people from improper statements of weight. The legislative findings, 21 U.S.C. § 451, and the declaration of policy, 21 U.S.C. § 452, speaking of the need for protection against unwholesome poultry products and of the importance of providing for inspection "to prevent the movement in . . . commerce . . . of poultry products which are unwholesome, adulterated or otherwise unfit . . . ", do not carry the implication that any of these objectives would be frustrated if the states were to impose supplemental regulations, at the end of the stream of commerce, to insure accomplishment of these ends—much less if the receiving states should further regulate a subject which the federal Act touches so slightly as weights. While the Act contains the quoted provisions as to labelling, these are merely incidental to the primary provisions for inspection of poultry products. Passage of the Act did not result from any belief on the part of Congress that there were serious weight or labelling abuses demanding correction; neither the legislative findings nor the declaration of policy make any reference to these subjects. In the entire statute, stretching over nine pages in the Statutes at Large, the sole reference to disclosure of weight consists of one short clause. The House Report, No. 465, 85th Cong., 1st Sess. 1957; 2 U.S. Code Cong. & Adm. News 1957, pp. 1632-33, and the Senate Report, No. 195, 85th Cong., 1st Sess., 1957, say nothing on the subject save for a passing mention of a statement of "the quantity" in paraphrasing the labelling section where this clause appears.

[fol. 540] Insofar as plaintiffs contend that the extra weighings needed to meet New York's requirement frustrate the primary Congressional purpose by impairing the wholesomeness of the product, we reject the claim as wholly contrary to the evidence. The weighings would add something like half a minute to the 45 minutes in which the birds are now exposed between their bath in ice slush and their entry into the freezer; Armour's plant superintendent admitted, with commendable candor, that the small additional time and handling would have no adverse effect.[7]

For reasons already indicated in part, we likewise cannot conclude that a state requirement of a more detailed declaration of weights was ruled out by mere enactment of the federal statute. Although the Secretary of Agriculture may have reasonable leeway to determine what net weight shall be shown on the official federal label and the label provisions of the Act recognize the necessity of protecting the integrity of the "official inspection mark" (21 U.S.C. §454(j)) and contain a normal prohibition of "false and misleading labeling", there is no basis for assuming that any further statement as to weight that a state may require would necessarily affect the integrity of the official inspection mark or be "false or misleading". To borrow from Mr. Justice Brennan's opinion in the *Florida Avocado Growers* case, the manner of stating the weight of frozen stuffed turkeys in various markets "seems to be an inherently unlikely candidate for exclusive federal regulation," 373 U.S. at 143. There is here a complete absence of the "special and peculiar history" that led the Court to conclude in Rice v. [fol. 541] Santa Fe Elevators Corp., 331 U.S. 218, 232 (1937), that a more pervasive but non-conflicting state regulation must yield to the amended federal Warehouse Act, 46 Stat. 1463 (1931). There is a marked contrast with the importance attached in Campbell v. Hussey, 368 U.S. 297 (1961), to the expressed intention to establish *uniform* standards in the Tobacco Inspection Act, 49 Stat. 731 (1935). And the problem is in no wise comparable with that in Napier v. Atlantic Coast Line R.R., 272 U.S. 605 (1926), where the decision as to the exclusivity of the Boiler Inspection Act must have been influenced by the paralyzing effect on railroads from prescription by each state of the safety devices obligatory on locomotives that would pass through many of them. Compare Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). Here, as has been noted, plaintiffs will encounter no serious manufacturing problem in conforming to New York's requirements even though the federal authorities and other states have not gone so far. We conclude that plaintiffs cannot prevail on their general argument as to federal occupation of the field.

B.

We must thus examine not only the precise language of the Poultry Products Inspection Act but also the regulations issued and actions taken thereunder to determine whether an irreconcilable conflict has arisen between what the United States has commanded and what New York requires. Cloverleaf Butter Co. v. Patterson, *supra*, 315 U.S. [fol. 542] at 155-56; Florida Lime & Avocado Growers, Inc. v. Paul, *supra*, 373 U.S. at 146.

We begin by observing that, as we understand New York's position, it does not demand any modification in the weight label adjacent to the Department of Agriculture's official inspection stamp; we shall assume New York would be satisfied, as indeed it must be, so long as somewhere on the container there is a statement of the net weight of the bird before stuffing, on which, if need be, any federal responsibility could be expressly disclaimed. Such a presentation should go a long way toward satisfying the concern expressed in the letter of the Head of the Poultry Products

Section of the Department of Agriculture lest an inaccurate statement should occur when an occasional bird, weighed before stuffing, loses its tag in the process—although we would indeed suppose that a technology that has been able to develop computers, space satellites, and supersonic airplanes could find means to conquer this problem.[8] The federally approved label, adjacent to the inspection mark, thus need contain only what it now contains—a recital of the net weight of the stuffed bird as it enters the freezing chamber.

The question thus becomes whether the United States has prohibited plaintiffs from affixing an additional label that will meet New York's requirements. Reading the statute in the manner prescribed in cases of this sort, we find no "unambiguous congressional mandate to that effect." 373 U.S. at 147. Although we assume that the Secretary of Agriculture or his delegate, the Administrator of the Agricultural [fol. 543] Marketing Service, is empowered to construe the required statement of "net weight", § 457(a), as referring to the net weight of the stuffed bird, this alone would not outlaw further statements concerning weight so long as these do not obscure or detract from the force of the federally approved label, and so long as they are not presented so as to imply federal approval. Indeed, this view is supported by regulation 81.127, footnote 5 *supra*, which, although confusingly worded, shows concern only for labels which bear official identification. Consistent with this, we read the communications from the Department as merely rejecting the particular labels submitted for approval and not as attempting to rule broadly that any supplementary labelling of weight in addition to that satisfying the Department would be unlawful.

Neither can we sustain Swift and Armour on the basis that the communications are a finding that a supplementary label satisfying the demands of the New York Commissioner would inevitably be so misleading as to fall within the proscription of the federal statute. When the alleged inconsistency of a state with a federal regulation is not apparent on the face of the two commands but hinges on a factual determination, a citizen desiring freedom from the state regulation does not discharge his burden by obtaining a letter from a subordinate federal official—at least when Congress has laid out a fact-finding procedure as to which the state could be given notice and an opportunity to be heard. Cf. Federal Power Comm'n v. Arkansas Power & Light Co., 330 U.S. 802 (1947), reversing *per curiam* the decision of the Court of Appeals for the District of Co- [fol. 544] lumbia, 156 F. 2d 821 (1946). The statute, § 457 (b), and the regulations, 7 C.F.R. § 81.130(c), provide that a person aggrieved by a determination may request a hearing and, if the preliminary determination is then adhered to, may obtain judicial review. Swift and Armour were obliged at least to pursue the former remedy if this was necessary to obtain a clear determination that any label satisfactory to New York would be banned by the federal Administrator as misleading. We think it highly unlikely that upon a departmental hearing, with New York given the notice that proper respect to its authority would demand, anyone could reasonably find that a separate statement of the weight of the unstuffed bird would be false or misleading. To the contrary, we are convinced by the evidence that the additional statement would make the total impression less misleading than simply having a label which, as was testified, in one instance showed a net weight of 7¼ pounds for a stuffed turkey which, after defrosting, was found to contain 2⅛ pounds of stuffing—even if an occasional turkey might unwittingly strut under another's tag.

[fol. 545]

III.

We now reach the question, postponed at the outset, whether this is a case seeking an "injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . upon the ground of the unconstitutionality of such statute," 28 U.S.C. § 2281, as to which alone a court of three judges is required. Before March 26, 1962, when the Supreme Court decided Kesler v. Department of Public Safety of Utah, 369 U.S. 153, the question would have been speedily answered in the negative. Since the claims that application of the New York statute violates the commerce clause or the Fourteenth Amendment are insubstantial, the serious questions that remain are of federal statutory preemption and of conflict between federal and state enactments; these had not been considered to be claims of "unconstitutionality" within § 2281, even though an elegant statement of the argument would end with a reference to the supremacy clause of Article VI of the Constitution. See Kesler v. Department of Public Safety of Utah, *supra,* 369 U.S. at 175-76 and fn. 5 (dissenting opinion of the Chief Justice) (1962); Wright, Federal Courts 164 (1963). But, in Professor Wright's language, the *Kesler* decision qualified "the cases which seemed to so hold with a very subtle rule", namely, that § 2281 was applicable when "no question of statutory construction, either of a state or a federal enactment, is in controversy" so that the case "presents a sole, immediate constitutional question", as distinguished from cases "which presented issues of statutory construction even though perhaps eventually leading to a constitutional question," 369 U.S. at 157-58.

[fol. 546] When we reflect on what we have written, we think we have indeed construed the Poultry Products Inspection Act, both to determine whether it was meant to oust all state regulation of weights *ex proprio vigore* and to decide whether it bans the statement as to weight on which New York insists. If a problem of statutory construction exists whenever "there is a fair contest between two readings, neither of which comes without respectable title deeds . . . ", Frankfurter, Some Reflections on the Reading of Statutes, in Of Law and Men 45 (1956), it would seem that even under *Kesler* this was a case for a single judge, although Judge Croake in calling for a three-judge court and the Chief Judge of the Circuit in responding to his call could hardly have been expected to foresee just how the case would develop. But the issue is not that simple. The *Kesler* case itself required consideration of the purpose and effect of § 17 of the Bankruptcy Act—an issue on which, indeed, the Justices did not agree. The question therefore is not whether we have engaged in construction of a federal statute *simpliciter*, but whether we have engaged in so much more construction than in *Kesler* as to make that ruling inapplicable.[9] If we were obliged to answer that question, we would say we had. But we see no need to assume a task for which our litmus paper is not sufficiently sensitive to permit an assured answer, and as to which the consequences of a wrong decision in one direction might be so serious. Although a single district judge is without power to act in a case requiring three judges, the opposite is not true, Phillips v. United States, 312 U.S. 246, 254 (1941); Public Service Comm. of Missouri v. Brashear [fol. 547] Freight Lines, Inc., 312 U.S. 621, 626 (1941).[10] Since a return of the case to Judge Croake would result in an invalid order if the return was erroneous, whereas the only consequence of erroneous retention of jurisdiction by the three-judge court is that the appeal should be taken to the Court of Appeals rather than to the Supreme Court, an uncertainty against which the plaintiffs may protect themselves by timely appeals to both courts, see also Bailey v. Patterson, 369 U.S. 31 (1962); Turner v. City of Memphis, 369 U.S. 350 (1962), we direct that judgment dismissing the complaint be entered in the name of the three-judge court, at the same time certifying out of abundant caution that Judge Croake individually arrived at the same conclusion that we have reached collectively.

The complaint is dismissed.

Henry J. Friendly, U.S.C.J.; Thomas F. Croake, U.S.D.J.; Inzer B. Wyatt, U.S.D.J.

June 10, 1964.

[fol. 548] [1] This was incorporated, effective March 1, 1964, in § 221.9(c), which provides:

> "Except for immediate consumption on the premises where sold or as one of several elements comprising a ready-to-eat meal sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat food products, poultry (whole or parts) and all seafood except shellfish, offered or exposed for sale or sold, as food shall be offered or exposed for sale and sold by net weight."

[2] This is on the assumption that two added weighings are needed. In fact the evidence indicated that, in lieu of the present practice whereby the stuffed bird is weighed after being placed in a Cryovac bag, for which appropriate adjustment is made, it would be possible simply to weigh the unstuffed and the stuffed bird and then add a previously determined weight of the giblets. On this basis only one extra weighing of the bird would be required.

[3] "There shall be one measure of wine throughout our whole kingdom, and one measure of ale, and one measure of grain, that is the London quarter, and one width of dyed cloth and of russets and of halbergets, that is two ells within the selvages; of weights, moreover, it shall be as of measure."

[4] See, e.g., the Massachusetts Act of 1647, Massachusetts Colonial Laws, pp. 199-200.

[5] 7 CFR § 81.125:

"Except as may be authorized by the Administrator with respect to shipment of products between official establishments, each shipping container and each immediate container of any product shall at the time it leaves the official establishment [fol. 549] bear approved labels containing information in accordance with the provisions set forth in §§ 81.126 to 81.146, inclusive, and the act."

7 CFR § 81.127:

"No label, except printer's proofs bearing official identification shall be printed until the printer's proof or a photostatic copy has been found by the Administrator to be acceptable . . ."

7 CFR § 81.130:

"(a) Each label approved for use on an immediate container for poultry products shall bear in distinctly legible form the following information:

(1) The common or usual name of the poultry product.

(2) A statement of ingredients if fabricated from two or more ingredients, including a declaration as to artificial flavors, colors or preservatives, if any. Such ingredients shall be listed by their common or usual names in the order of their descending proportions. * * *

(3) The net weight or other appropriate measure of the contents, except that the Administrator may approve the use of labels for certain types of immediate containers which do not bear the net weight: . . . The net weight marked on containers of poultry products shall be the net weight of the poultry products and shall not include the weights of the wet or dry packaging materials and giblet wrapping materials.

(4) The name and address of the packer or distributor and when the name of the distributor is shown, it shall be qualified by such term as 'packed for,' 'distributed by,' or 'distributors.'

(5) The official inspection mark.

* * * * * * *

"(c) Any label which bears the official inspection mark or any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of the regulations shall not bear any statement that is false or misleading. If the Administrator has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in [fol. 550] such manner as the Administrator may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Administrator, he may request a hearing, but the use of the label shall, if the Administrator so directs, be withheld pending hearing and final determination by the Administrator. Any person so denied the approval of any label shall be notified promptly of the reasons for the denial. A written application for a hearing with respect to the denial may be filed by said person with the Administrator within 10 days after notice of the denial. Such petition shall state specifically the errors alleged to have been made by the Administrator in denying approval of the label. After consideration of the facts adduced at the hearing, any determination with respect to the matter by the Administrator shall be conclusive unless, within 30 days after the receipt of notice of such final determination, the person adversely affected thereby appeals to the United States Court of Appeals for the Circuit in which he has his principal place of business, or to the United States Court of Appeals for the District of Columbia Circuit. . . ."

[6] The *Avocado Growers* dissenters criticized this statement as a reference to "the uncited 'all the authorities,' which appear to be non-existent." 373 U.S. at 174.

[7] It is true that danger of contamination resulting from additional weighings was one of the reasons given in the letter of an official of the Department of Agriculture explaining to Swift the rejection of its labelling proposal. But since this reason was not among those given in the official statement of rejection and since there had been no hearings on the subject, this informal comment cannot be taken as an authoritative statement of the Secretary's position. In any event we should be forced to reject it as unsupported by substantial evidence.

[fol. 551] [8] The Department's concern that the purchaser could not precisely verify the statement of weight before stuffing since the stuffing might absorb some of the bird's juices during defrosting would seem a worry more appropriate for New York. Apparently New York has decided that a statement whose policing may require reasonable tolerance is better than none.

[9] United States v. Georgia Public Service Comm'n, 371 U.S. 285, 287 (1963), in which the Court requested counsel to brief and argue the applicability of *Kesler*, 369 U.S. 882 (1962), went off on the point that the case presented a substantial question of conflict with the Constitution itself. See also Borden Co. v. Liddy, 309 F.2d 871, 874 (8 Cir. 1962), cert. denied, 372 U.S. 953 (1963), and Note, The Three-Judge District Court: Scope and Procedure under Section 2281, 77 Harv. L.Rev. 299, 313-15 (1963), criticizing the *Kesler* decision.

[10] It is not altogether plain whether the rationale is that the two additional judges are surplus, see Healy v. Ratta, 67 F.2d 554, 556 (1 Cir. 1933), reversed on other grounds, 292 U.S. 263 (1934); O'Malley v. United States, 128 F.2d 676, 687 (8 Cir. 1942), rev'd on other grounds, 317 U.S. 412 (1943), a theory that would create problems if the district judge to whom the application was initially presented was in disagreement; cf. Cannonball Transp. Co. v. American Stages, Inc., 53 F.2d 1050 (S.D.Ohio 1931); United States v. Query, 37 F.Supp. 972, 977 (E.D.So.Car.), aff'd 121 [fol. 552] F.2d 631 (4 Cir.), cert. denied, 314 U.S. 685 (1941), cert. granted, 316 U.S. 653, vacated and remanded, 316 U.S. 486 (1942); or that the three judges are sitting as a district court *in banc*, 28 U.S.C. § 132, see International Longshoremen's Union v. Ackerman, 82 F.Supp. 65, 93-94 (D. Hawaii, 1948), rev'd on other grounds, 187 F.2d 860 (9 Cir. 1951); and Wilson & Co. v. Freeman, 179 F.Supp. 520, 524 (D.Minn. 1959); or something else.

[fol. 554] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

63 Civil 3085

Jud #66,791

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,
Plaintiffs,

vs.

DON J. WICKHAM, Commissioner of Agriculture and
Markets of the State of New York, Defendant.

JUDGMENT—June 12, 1964

A Statutory Court having been convened for the trial of the issues in the above entitled proceeding and having come on to be heard before the Honorable Henry J. Friendly, United States Circuit Judge and Thomas F. Croake and Inzer B. Wyatt, United States District Judges on March 5, 10 & 11, 1964, and the Court having handed down its per curiam opinion on June 10, 1964, in favor of the defendant, it is

ADJUDGED that the defendant, Don J. Wickham, Commissioner of Agriculture and Markets of the State of New York, have judgment against the plaintiffs, Swift & Company, Inc. and Armour and Company, dismissing the complaint.

Dated: New York, N.Y.
June 12, 1964.

James E. Valeche, Clerk.

Aug. 6, 1964

Cases taxed in the sum of $187.21.

James E. Valeche, Clerk.

[fol. 555] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE FOR THE SOUTHERN DISTRICT OF NEW YORK

63 Civil 3085

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,
Plaintiffs,

v.

DON J. WICKHAM, Commissioner of Agriculture and
Markets of the State of New York, Defendant.

ORDER AMENDING JUDGMENT ENTERED ON JUNE 12, 1964 —Filed July 17, 1964

This cause having come on to be heard on the motion of plaintiff Swift & Company, Inc. for an order amending the judgment entered herein to conform to the opinion of the Court, and it appearing to the Court that the judgment entered on June 12, 1964 by the Clerk of the Court does not adequately reflect the action indicated by the Court in its opinion, it is

ORDERED, that the judgment herein be amended so as to indicate that the dismissal of the complaint herein reflects the individual action of Judge Croake as well as the collective action of Circuit Judge Friendly and District Judges Croake and Wyatt.

Dated: July 2nd, 1964
New York, New York

Thomas F. Croake, USDJ.

[fol. 556] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
63 Civil 3085

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,
Plaintiffs,

—against—

DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York, Defendant.

NOTICE OF APPEAL—Filed August 10, 1964

I.

Notice is hereby given that Swift & Company, Inc., and Armour and Company, the plaintiffs above-named, hereby appeal to the Supreme Court of the United States from the Final Judgment entered June 12, 1964 as amended by the order of District Judge Croake, entered on July 17, 1964, dismissing the complaint herein.

This appeal is taken pursuant to 28 USC, Section 1253.

II.

The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

(1) Amended complaint of the plaintiffs, filed November 7, 1963.

(2) Defendant's answer filed December 3, 1963.

(3) Order of Chief Judge J. Edward Lumbard, United States Court of Appeals for the Second Circuit, designating Court of Three Judges, dated November 21, 1963.

[fol. 557] (4) Trial proceedings March 5, 10 and 11, 1964, including reporter's transcript of oral testimony, Plaintiffs' exhibits 1, 2, 5, 6, 7, 8, 9, 10, 11 and 12, and Defendant's exhibits A through G.

(5) Opinion of Three Judge Court dated June 10, 1964.

(6) Entry of judgment June 12, 1964.

(7) Order of Judge Croake dated July 2, 1964, entered July 17, 1964, amending judgment.

(8) Plaintiffs' notice of appeal and designation of record on appeal.

III.

(1) Do not Section 193 of the Agriculture and Markets Law of the State of New York and Regulation 221.40, superseded during the pendency of this action by Regulation 221.9(c) as applied by Defendant to require labelling prohibited to Plaintiffs by the Secretary of Agriculture under the Poultry Products Inspection Act, 21 USC 451, et seq., raise such substantial questions of constitutionality with respect to the Supremacy Clause of the United States Constitution (Article VI, Section 2), the Commerce Clause of the United Constitution (Article I, Section 8, Clause 3), and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution as to warrant determination by a Three Judge District Court pursuant to the provisions of 28 USC 2281, et seq.?

(2) Do not the aforesaid New York Statute and Regulations as applied by Defendant to require a label on frozen stuffed poultry which is forbidden to Plaintiffs by the Secretary of Agriculture, pursuant to the Poultry Products Inspection Act, 21 USC 451, et seq., present such a conflict with federal law as to violate the Supremacy Clause of the United States Constitution (Article VI, Section 2)?

[fol. 558] (3) Do not the aforesaid New York Statute and Regulations as applied by the Defendant to prohibit the sale in the State of New York of products labelled in accordance with the Poultry Products Inspection Act, 21 USC 451, et seq., and to require labelling forbidden by the Secretary of Agriculture pursuant to that Act, constitute ar obstruction to and a burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3)?

(4) Do not the aforesaid New York Statute and Regulations as applied by Defendant to deny to Plaintiffs access to one of the major consuming areas in the United States by virtue of their compliance with the Poultry Products Inspection Act deny to Plaintiffs due process of law guaranteed to them under the Fourteenth Amendment to the United States Constitution?

(5) Do not the aforesaid New York Statute and Regulations as applied by Defendant in effect, by reason of their conflict with the Poultry Products Inspection Act, permit the sale in the State of New York of only that stuffed poultry which has been prepared in the State of New York discriminate against interstate commerce, thus denying to Plaintiffs the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the United States Constitution?

(6) In view of the long standing policy of the United States Department of Agriculture to permit only a statement of total weight on a poultry product, is it necessary for Plaintiffs to pursue administrative and judicial appeals from restatement of that policy in order to perfect their right to seek relief in this proceeding from the operation of a state statute which is in direct conflict with that policy?

[fol. 559] (7) In the case of a poultry product produced under the supervision of the United States Department of Agriculture pursuant to the Poultry Products Inspection Act, 21 USC 451, et seq., does the act permit the application to that product of a label or any part of a label not approved by the Department of Agriculture?

William J. Condon, Esq., Attorney for Plaintiff, Swift & Company, Inc., Office & P. O. Address, 19 West 44th Street, New York 36, New York.

Evans, Orr, Gourlay & Pacelli, Esqs., By: Edward J. Pacelli, Attorney for Plaintiff, Armour and Company, Office & P. O. Address, 15 Park Row, New York 38, New York.

To: Louis J. Lefkowitz, Esq., Attorney General, State of New York, 80 Centre Street, New York 13, New York.

[fol. 560] Acknowledgment of Service (omitted in printing).

[fol. 561]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

63 Civil 3085

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY, Plaintiffs,

v.

DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York, Defendant.

ORDER AUTHORIZING TRANSMISSION OF ORIGINAL PAPERS —September 16, 1964

Upon the annexed affidavit of William J. Condon, duly sworn to on the 16th day of September, 1964, upon the notice of appeal of appellants filed herein on the 10th day of August, 1964, and upon all the papers filed and proceedings had herein,

Now, upon motion of William J. Condon and Evans, Orr, Gourlay and Pacelli, attorneys for the appellants, it is hereby,

Ordered, that pursuant to United States Supreme Court Rule 12(4), the Clerk of this Court is hereby authorized and directed to transmit to the Clerk of the Supreme Court of the United States all the original papers filed in the office of the Clerk of this Court which are specified in the designation of the appellants as contained in their notice of appeal; and it is further

Ordered, that said records be returned to the Clerk of this Court upon the conclusion of this appeal.

Richard N. Levet, U.S.D.J.

Dated at New York, New York, September 16th, 1964.

[fol. 562] AFFIDAVIT

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

William J. Condon, being duly sworn, says:

I am an attorney for appellant, Swift & Company, Inc., am conversant with all the proceedings heretofore had herein and submit this affidavit in support of the annexed proposed order for the transmission of original papers herein to the Clerk of the Supreme Court of the United States.

The above-entitled action was brought to enjoin the enforcement of and to seek a judgment declaring unconstitutional Section 193 of the Agriculture and Markets Laws of the State of New York as applied to certain of appellants' products, and was heard before a statutory three-judge court of this District. On June 12, 1964, the District Court rendered its opinion and judgment was subsequently entered dismissing the complaint.

[fol. 563] A notice of appeal from said judgment to the Supreme Court of the United States was duly filed herein on August 10, 1964, by the appellants and said notice of appeal designates the portion of the record herein desired to be transmitted to the Clerk of the Supreme Court of the United States. The appellee failed to cross-designate additional portions of the record to be transmitted to the Clerk of the Supreme Court. All of the papers so designated shall be the entire record in this appeal inasmuch as the 20-day period during which cross-designations may be made has expired.

The record so designated for transmission to the Supreme Court is extensive. The reproduction of all the papers designated would be an inordinately burdensome undertaking and the task of conforming such reproduced papers by the Clerk of this Court would be both time-consuming and costly.

Rule 12(4) of the Rules of the United States Supreme Court permits the transmission of original records. Affiant will cooperate with and assist the Clerk of this Court in assembling and indexing the designated papers.

No previous application for the relief herein sought has heretofore been made.

William J. Condon

Sworn to before me this
16th day of September 1964

Peter M. Groeschel
Notary Public, State of New York
No. 31-1580570
Qualified in New York County
Commission Expires March 30, 1965

[fol. 564] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 565]

SUPREME COURT OF THE UNITED STATES

No. 571, October Term, 1964

SWIFT & COMPANY, INC., et al., Appellants,

v.

DON J. WICKHAM, Commissioner of Agriculture and Markets of New York.

Appeal from the United States District Court for the Southern District of New York.

ORDER POSTPONING JURISDICTION
—February 1, 1965

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The Solicitor General is invited to file a brief on the merits.

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FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. [redacted] 9

SWIFT & COMPANY, INC., and ARMOUR AND COMPANY,
Appellants,

—v.—

DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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Regulation [illegible]
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Utah Motor Vehicle Safety Responsibility Act

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§ [illegible]
§ [illegible]
§ [illegible]
§ [illegible]
§ [illegible]
§ [illegible]

IN THE

Supreme Court of the United States

No. ....

SWIFT & COMPANY, INC., and ARMOUR AND COMPANY,
Appellants,

—v.—

DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Southern District of New York, entered on June 12, 1964, as amended by order entered on July 17, 1964, dismissing the complaint herein, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinion Below

The opinion of the United States District Court for the Southern District of New York is reported in 230 F. Supp. 398. A copy of the opinion is attached hereto as Appendix A.

Jurisdiction

This suit was brought under 28 U. S. C. 2281 to enjoin the enforcement of Section 193 of the Agriculture and Markets Law of the State of New York and under 28 U. S. C. 2201 for a judgment declaring this section of New York law and the regulation promulgated thereunder to be unconstitutional. The judgment of the District Court was entered on June 12, 1964, amended by Order entered July 17, 1964, and Notice of Appeal was filed in that court on August 10, 1964. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U. S. 73; *Kesler* v. *Department of Public Safety of Utah,* 369 U. S. 153; *St. John* v. *Wisconsin Employment Relations Board,* 340 U. S. 411.

Questions Presented

(1) Do not Section 193 of the Agriculture and Markets Law of the State of New York and Regulation 221.40, superseded during the pendency of this action by Regulation 221.9(c), as applied by appellee to require labeling prohibited to appellants by the Secretary of Agriculture under the Poultry Products Inspection Act, 71 Stat. 441, 21 U. S. C. 451, *et seq.*, raise such substantial questions of constitutionality with respect to the Supremacy Clause of the United States Constitution (Article VI, Section 2), the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3), and the Due Process and Equal Protection Clauses of the Fourteeenth Amendment to the

United States Constitution as to warrant determination by a Three Judge District Court pursuant to the provisions of 28 U. S. C. 2281, *et seq.*?

(2) Do not the aforesaid New York Statute and Regulation as applied by appellee to require a label on frozen stuffed poultry which is forbidden to appellants by the Secretary of Agriculture, pursuant to the Poultry Products Inspection Act, 71 Stat. 441, 21 U. S. C. 451, *et seq.*, present such a conflict with federal law as to violate the Supremacy Clause of the United States Constitution (Article VI, Section 2)?

(3) Do not the aforesaid New York Statute and Regulation as applied by appellee to prohibit the sale in the State of New York of products labeled in accordance with the Poultry Products Inspection Act, 71 Stat. 441, *et seq.*, and to require labeling forbidden by the Secretary of Agriculture pursuant to that Act, constitute an obstruction to and a burden upon interstate commerce in violation of the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3)?

(4) Do not the aforesaid New York Statute and Regulation as applied by appellee to deny to appellants access to one of the major consuming areas in the United States by virtue of their compliance with the Poultry Products Inspection Act deny to appellants due process of law generated to them under the Fourteeenth Amendment to the United States Constitution?

(5) Do not the aforesaid New York Statute and Regulation as applied by appellee, in effect, by reason of their conflict with the Poultry Products Inspection Act, 71 Stat. 441, 21 U. S. C. 451, permit the sale in the State of New York

of only that stuffed poultry which has been prepared in the State of New York, discriminate against interstate commerce, thus denying to appellants the equal protection of the laws guaranteed to them by the Fourteenth Amendment to the United States Constitution?

(6) In view of the long standing policy of the United States Department of Agriculture to permit only a statement of total weight on a poultry product, is it necessary for appellants to pursue administrative and judicial appeals from a restatement of that policy in order to perfect their right to seek relief in this proceeding from the operation of a state statute which is in direct conflict with that policy?

(7) In the case of a poultry product produced under the supervision of the United States Department of Agriculture pursuant to the Poultry Products Inspection Act, 71 Stat. 441, 21 U. S. C. 451, *et seq.*, does the act permit the application to that product of a label or any part of a label not approved by the Department of Agriculture?

Statutes Involved

Section 193 of the Agriculture and Markets Law of the State of New York; The Poultry Products Inspection Act; Regulations 221.40 and 221.9(c) of the State of New York; and Sections 81.1, 81.7, 81.125, 81.127, 81.130 of 7 C. F. R. are set forth in Appendix B hereto.

Statement of the Case

Appellants pack frozen stuffed turkeys in Minnesota and Wisconsin. They ship the turkeys into New York for sale to retailers who resell them to consumers. These turkeys are labeled so as to show the total net weight of the poultry product, viz., stuffed turkey, as required by the United States Department of Agriculture. Section 193 of the Agriculture and Markets Law of the State of New York and regulations issued thereunder require a separate statement of the net weight of the turkey in addition to the net weight of the whole product. Pursuant thereto, appellee, Commissioner of Agriculture and Markets of New York, has taken and threatened to take action that will prevent the sale of appellants' stuffed turkeys unless they are labeled in compliance with New York law.

In mid-1963 both appellants applied to the United States Department of Agriculture for approval of a label which would satisfy the New York requirement. In accordance with its long-standing policy against multiple weight statements on combination products, the Department of Agriculture denied these applications. Appellants did not seek administrative or judicial review of these denials.

Appellants brought this action in the United States District Court for the Southern District of New York seeking a declaration of their right to sell stuffed turkeys in New York under the federally approved label and an injunction against appellee's enforcing the New York labeling law. The complaint alleges that Section 193 of the New York Agriculture and Markets Law and the action taken and threatened by appellee under it violate appellants' rights under the commerce and supremacy clauses of the United States Constitution and the due process and equal protection clauses of the Fourteenth Amendment. At appellants' request, the action was heard by a three judge court pursuant to 28 U. S. C. Section 2281.

The District Court dismissed the complaint and entered judgment for the appellee. The Court found no merit in appellants' contentions with respect to the commerce clause or the claims under the Fourteenth Amendment. With respect to the Supremacy Clause, the Court found no congressional purpose to preempt the field so as to preclude State action with respect to the labeling of poultry products. The Court further found that there was no irreconcilable conflict between the federal act and the New York statute so as to render the latter invalid. In this connection, the Court held that appellants could, consistent with the federal law, add a supplementary label to their products which would not bear federal approval. Finally, the District Court questioned whether this was properly a case for a three judge court, but left the issue open, suggesting that appellants prosecute simultaneous appeals to the Supreme Court and to the Court of Appeals for the Second Circuit. Both appeals have been filed and the matter is being held in abeyance in the Court of Appeals pending determination of this issue in the Supreme Court.

The Questions Are Substantial

Three Judge District Court

This case is similar to *Florida Lime & Avocado Growers* v. *Jacobsen,* 362 U. S. 73, in that the complaint combines a challenge based upon conflict between state and federal statutes with claims of violation of rights guaranteed under the Commerce Clause and the Fourteenth Amendment. The *Jacobsen* case establishes that the matter, therefore, was properly heard by a Three Judge District Court. After remand and hearing, a full review was accorded by the Supreme Court on the conflict issue, *Florida Lime & Avocado Growers* v. *Paul,* 373 U. S. 132. Discussion of the substantiality of the Commerce Clause and Fourteenth Amendment questions will be found in paragraphs 3, 4 and 5, *infra.* Under *Kesler* v. *Department* *of Public Safety of Utah,* 369 U. S. 153, even a case where conflict with a federal statute is the sole basis upon which a state enactment is challenged may properly be heard by a Three Judge District Court where there is presented an immediate constitutional question without the necessity of construing state or federal statutes. However, as noted by the District Court in its opinion below, the Court in *Kesler* engaged in considerable construction of both the Bankruptcy Act and the Utah Motor Vehicle Safety Responsibility Act, with substantial disagreement among the Justices. The appropriate issue, therefore, is whether this case requires more statutory interpretation than was before the Court in *Kesler.* Unlike *Kesler,* no serious problem is involved here in discovering the meaning and application of the New York law and regulation. New York's requirement is clear and undisputed, whereas there was substantial controversy as to whether the policy of the Utah law was to foster motor vehicle safety or the collection of judgments. The Courts in both cases sought the policy underlying the Federal Acts in order to determine whether the apparent conflict was irreconcilable. Thus, this case appears to involve less, but in any event not more, statutory construction than *Kesler.* Accordingly, the case was properly one for determination by a Three Judge Court.

Supremacy Clause

The appellee's application of the New York Statute and regulation to require a label on appellants' frozen stuffed poultry which is forbidden by the Secretary of Agriculture under the Poultry Products Inspection Act (71 Stat. 441, 21 U. S. C. Section 451 *et seq.*) conflicts with the Federal Law and thereby violates the Supremacy Clause of the United States Constitution (Article VI, Section 2).

The District Court, in its review of the Supremacy Clause argument acknowledges that it "raises most serious issues." The Court found appellee's interpretation of the New York Statute to be reasonable and the regulation to be within his authority.

The heart of the matter lies in the fact that Federal law permits the shipment in interstate commerce of frozen stuffed turkeys bearing a single net weight legend, whereas New York law requires such product to show separately the net weight of the unstuffed turkey as well. A state statute cannot stand if—in terms or in practical administration—it conflicts with the Federal law or infringes on Federal policy. *Cloverleaf Butter Company* v. *Patterson,* 315 U. S. 148; *Quaker Oats Company* v. *City of New York,* 295 N. Y. 527, affd. sub nom. *Hill Packing Company* v. *City of New York,* 331 U. S. 787; *Kansas Packing Company* v. *City of New York,* 131 N. Y. S. 2d 351, affd. 309 N. Y. 696. In *Florida Avocado Growers* v. *Paul,* 373 U. S. 132, 142-3, the Supreme Court of the United States said:

> "A holding of Federal exclusion of State law is inescapable and requires no inquiry into Congressional design where compliance with both Federal and State regulations is a physical impossibility for one engaged in interstate commerce, cf. *Union Bridge Co.* v. *United States,* 204 U. S. 364, 399-401, 51 L. ed. 523, 539, 27 S. Ct. 367; *Morgan* v. *Virginia,* 328 U. S. 373, 90 L. ed. 1317, 66 S. Ct. 1050, 165 ALR 574; *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U. S. 520, 3 L. ed. 2d 1003, 79 S. Ct. 962. That would be the situation here if, for example, the Federal orders forbade the picking and marking of any avocado testing more than 7% oil, while the California test excluded from the state any avocado measuring less than 8% oil content. No such impossibility of dual compliance is presented on this record, however".

An impossibility of dual compliance is clearly present here. Appellants cannot comply with either Federal or New York requirements without running afoul of the other. The District Court opinion refers to the first two sections of the Poultry Products Inspection Act, 21 U. S. C. Section 451, and the Declaration of Policy, 21 U. S. C. Section 452, and notes that they are barren of reference to a needed correction of weight or labeling abuses and hence carry no implication that the objectives therein would be frustrated if the states were to impose supplemental regulations "at the end of the stream of commerce." The argument thus made is in support of a State regulation or statute as being merely supplementary to the Federal law, not in conflict with it. The contention is that since the State merely requires additional information above and beyond that which the Federal law requires, there is no disharmony and the State Statute and regulation are, therefore, not in conflict with Federal law and, hence, not invalid. Thus, the District Court purports to resolve the conflict by denying its existence. However, neither appellee nor the District Court have challenged the validity of the Federal regulations which manifestly control in detail the labeling of poultry products moving in interstate commerce even to the ultimate consumer. The New York law, in terms and in practice, collides directly with the Federal scheme.

In terms, the New York law prohibits the importation of a product which has received the imprimatur of approval from the Federal authority. In practice it renders nugatory the inspections and approvals demanded by the Federal authority and effectually substitutes a different standard. Trading pursuant to the sanction thereby given by the Federal authority is infringed upon to an extent that does in fact render it impossible. The power of the State is sought to be applied within the operating plant where the processing of the product takes place under the supervision and control of the Federal authority. For, because of the nature of the process, the weight marking of the components of the product must necessarily take place during the processing at the plant of origin. Thus, it follows that the application of the New York law to the frozen stuffed turkeys of the appellants is a direct interference with the Congressional exercise of the power vested in the United States Department of Agriculture under the Poultry Products Inspection Act.

Commerce Clause

This Court has affirmed the competence of the Congress, invoking the Federal government's power over interstate commerce, to prescribe the substantive content of the label of merchandise which has traveled across state lines long after such merchandise has come to rest in the possession of a local retailer. *United States* v. *Sullivan,* 332 U. S. 689. In reaching such a conclusion the Court accepted as the objective of Congress in enacting the legislation submitted to judicial scrutiny the extension of coverage of Federal law

> "to every article that had gone through interstate commerce *until it finally reached the ultimate consumer*" (332 U. S. at 697). (Emphasis supplied.)

In enacting the Poultry Products Inspection Act, 71 Stat. 441, *et seq.,* 21 U. S. C. 451, *et seq.,* the Congress manifested its intention that the federal law follow the merchandise subject to its provisions at least until such merchandise reached the ultimate consumer. The Act defines as a label

> "any written, printed or graphic material upon the shipping container, if any, or upon the immediate container, *including but not limited to an individual*

> *consumer package* . . . " (21 U. S. C. 453(n)). (Emphasis supplied.)

The term "immediate container" is defined to include "any consumer package", 21 U. S. C. 453(p); the immediate container of a poultry product is required to bear the official inspection mark, the name of the product, its ingredients, the net weight, the name and address of the producer and the official number of the processing plant, 21 U. S. C. 457(a); the channels of interstate commerce are denied to a poultry product unless its immediate container is marked in accordance with the provision of the Federal law, 21 U. S. C. 458(a); the Secretary of Agriculture is given authority to promulgate regulations to carry out the provisions of the law, 21 U. S. C. 463. Pursuant to that authority, the Secretary has promulgated regulations which, *inter alia,* restate the statutory requirement that containers, including immediate containers, be properly labeled, 7 C. F. R. 81.125; require approval by the Secretary's designated agent prior to the use of a printed label, 7 C. F. R. 81.127; and mandate the wording of labels, 7 C. F. R. 81.130. The validity of these Regulations was not challenged by appellee in the District Court and, consequently, may not be attacked in this proceeding in the Supreme Court. *Beck* v. *Washington,* 369 U. S. 541, 554; *De Sylva* v. *Ballentine,* 351 U. S. 570, 582.

The District Court has held that the State of New York, represented here by its Commissioner of Agriculture and Markets,

> "has taken and threatens to take action that will prevent the sale of plaintiffs' turkey unless they comply" (230 F. Supp. at 401)

with appellee's interpretation of § 193-3 of the New York Agriculture and Markets Law and Reg. 221.9(e) of the

Regulations of the State of New York. Such interpretation, found to be reasonable by the District Court (see 230 F. Supp. at 401), mandates the separate statement, on the label of appellants' stuffed turkeys, of the net weight of the unstuffed bird as well as that of the finished product.

The authorized delegate of the Secretary of Agriculture of the United States, by approving labels used on appellants' stuffed turkey, sanctioned the shipment in interstate commerce of turkeys bearing such labels. The State of New York, by its action has closed its borders to a product legitimately introduced into interstate commerce with the approbation of the federal agency designated by the Congress to administer a detailed regulatory scheme. The conflict between the Federal and State positions is emphasized by the fact that appellants have sought approbation from the United States Department of Agriculture for labels bearing the information demanded by the State and have sought such relief in vain.

The District Court here was correct in concluding that "the Framers of the Constitution" did not intend to divest the states of their historic power to protect the public against false weights and measures or misleading statements about them. Nor is it contended that the Congress, in enacting the Poultry Products Inspection Act, *supra,* intended such a divestment. However, the Congress has acted with respect to the text of the labels of consumer packages of poultry products shipped in interstate commerce. See 21 U. S. C. § 453(n) and (p); 21 U. S. C. § 457; 21 U. S. C. § 450(a); 7 C. F. R. 81.125, 81.127, 81.130. To that extent, and *to that extent only,* New York is precluded from exercising its power of "ancient vintage" over weights and measures.

> "It has long been recognized that in those fields of commerce where uniformity is not essential either

> the state or federal government may act. (Citing cases.) Where this power exists, it often happens that there is a partial exercise of that power by the federal government. In such cases the state may legislate freely upon those phases of the commerce which are left unregulated by the action." *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 155-6.

A state is, of course, competent to regulate aspects of the distribution within its borders of goods previously shipped in interstate commerce and this proposition retains its validity in the presence of federal legislation regulating other aspects of trade in such goods. *Savage* v. *Jones,* 255 U. S. 501. But a state despite its admitted power to protect its citizens, is not constitutionally permitted

> "to discredit and burden legitimate Federal regulation of interstate commerce, to destroy rights arising out of the Federal statute which have occurred both to the government and the shipper and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject". *McDermott* v. *Wisconsin,* 228 U. S. 115, 133-4.

Appellants therefore assert, contrary to the District Court, that their contention that the New York regulation under attack is invalid *as applied* to appellants by reason of the Commerce Clause of the United States Constitution, Art. I, Section 8, cl. 3, raises substantial Constitutional issues which the Supreme Court must resolve.

Due Process and Equal Protection Under the Fourteenth Amendment

Property is more than the mere thing which a person owns; it includes the right to acquire, use and dispose of it; and the Constitution, in the Fourteenth Amendment, protects these essential attributes. *Buchanan* v. *Warley,* 245 U. S. 60; *Terrace* v. *Thompson,* 263 U. S. 197; *Louis K. Liggett Co.* v. *Baldridge,* 278 U. S. 105. Valid contracts are property. *Lynch* v. *United States,* 252 U. S. 571.

A label approved by a federal agency pursuant to the provisions of a statute of Congress, exercising its power under the Commerce Clause, confers upon the holder thereof a federal right to ship a product bearing that label anywhere in the United States. In *McDermott* v. *State of Wisconsin,* 228 U. S. 115, the Supreme Court while studying a Wisconsin labeling requirement which was interpreted to forbid the sale of corn syrup bearing a federally approved label opined as follows:

> "Conceding to the state the authority to make regulations consistent with the Federal Law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a state to discredit and burden legitimate Federal regulations of interstate commerce, *to destroy rights arising out of the Federal Statute* which have accrued both to the government and the shipper, and to impair the effect of a Federal law . . . " (228 U. S. at 133-4). (Emphasis added.)

See also *Quaker Oats Company* v. *City of New York,* 295 N. Y. 527, affirmed sub nom. *Hill Packing Company* v. *City of New York,* 331 U. S. 787; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148.

Federal law and Federal policy not only approve a single weight statement on a stuffed turkey label, but reject approval for a multiple weight statement on such a label. Therefore, the necessary result of the New York statute is that the only stuffed turkeys which may be sold in the State of New York are those produced therein. No stuffed turkey labeled in accordance with the New York requirements may be shipped in interstate commerce. Thus, whatever may have been its purpose, the inevitable effect of the New York law is to discriminate against interstate commerce.

The phrase due process of law "formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its asserted denial is to be tested not as a matter of rule, but rather by an appraisal of the totality of the facts involved in the given case." *Betts* v. *Brady,* 316 U. S. 455, 462. It is a concept of fundamental justice, and it is not satisfied by mere formal correctness. *Foster* v. *Illinois,* 332 U. S. 134. It requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice. *Buchalter* v. *New York,* 319 U. S. 427; *Hebert* v. *Louisiana,* 272 U. S. 312. It is secured if the laws operate on all alike, and does not subject the individual to an arbitrary exercise of the powers of government. *Missouri P. R. Co.* v. *Mackey,* 127 U. S. 205; *Minneapolis & St. L. R. Co.* v. *Herrick,* 127 U. S. 210; *Leeper* v. *Texas,* 139 U. S. 462; *Giozza* v. *Tiernan,* 148 U. S. 657; *Duncan* v. *Missouri,* 152 U. S. 377.

The question of equal protection is to be answered by practical considerations based on experience, such as whether a classification has relation to the purpose for which it is made, rather than by theoretical inconsistency. *Railway Express Agency* v. *New York,* 336 U. S. 106. The prohibitions of the Fourteenth Amendment extend to all actions of a State denying equal protection of the laws, whatever the agency of the State taking the action or whatever the guise in which it is taken. *Cooper* v. *Aaron,* 358 U. S. 1, 20.

A state does not ordinarily violate the equal protection of the laws requirement when the statutory provision complained of is applied equally to enterprises located both within and without a state. However, in this situation, the state statute denies the equal protection of law because it operates to exclude all such products of extrastate enterprises because they bear the Federally approved label or, conversely because it is impossible for them to comply with the State Statute without violating the Federal Statute.

A foreign manufacturer must ship its product in interstate commerce and, therefore, must comply with the Federal Poultry Products Inspection Act which requires a total net weight label. Such a label precludes the product from the New York Market. New York's exclusion of products bearing the Federally approved label denies to appellants the equal protection of law guaranteed to them by the Fourteenth Amendment.

Administrative and Judicial Appeals

It has long been an accepted rule of administrative law that one will not be heard to complain in the courts of administrative action or adjudication unless he has first exhausted his administrative remedies. *Myers* v. *Bethlehem Ship Building Corp.,* 303 U. S. 41; *Levers* v. *Anderson,* 326 U. S. 219. Citations to sustain this proposition could be proliferated almost endlessly. However, none has been found to sustain the proposition that he also must pursue administrative and judicial procedures if he would seek *to rely upon* an administrative determination. Other than the opinion in the Court below, no authority has been discovered which would require a party to appeal from a determination with which he agreed, even though technically it was contrary to his petition. In the instant case, the labels which were approved for appellants' stuffed turkeys are acceptable everywhere in the country except in the State of New York. When the Administrator withheld approval of appellants' application for labels showing multiple weight statements as required by New York law, appellants realized that the position taken by the Department of Agriculture was consistent, not only with its position on the hundreds of other poultry combination products, but also with its position with respect to its nearly 60 year administration of the Meat Inspection Act, 34 Stat. 1260, 21 U. S. C. 71. The law does not require that appellants expend months, maybe years of time and substantial sums of money in order to prove that the Administrator was right in order to perfect their standing to challenge the one state enactment which is contrary to the Federal position.

Appellants herein are not attacking the administrative determination of the Department of Agriculture. The attack was launched by the appellee and apparently furthered by the District Court. However, in so doing, the District Court seems to have overlooked an equally salutary principle. The Court should not substitute its judgment for that of the Administrator even though the Court might itself have reached a different result in the first instance. *Railroad Commission* v. *Rowan & Nichols Oil Company,* 310 U. S. 573; *Panama Canal Company* v. *Grace Lines, Incorporated,* 356 U. S. 309. The Administrator, with his knowledge of all facets of the industry, and his concern with the hundreds of products which might be affected by his determination, is in a much better position to determine the appropriateness of label information, than is the District Court, whose experience is largely limited to one case and one product.

Poultry Products Inspection Act

The word "label", as defined in section 4(n) of the Poultry Products Inspection Act "means any written, printed, or graphic material upon the shipping container, if any, or upon the immediate container, including but not limited to an individual consumer package, of the poultry product, or accompanying such product". This definition is essentially a combination of the definitions of "label" and "labelling" in section 201(k) and (m) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 301, *et seq.*, 52 Stat. 1040. Since the Poultry Products Inspection Act was enacted some 19 years after the Federal Food, Drug and Cosmetic Act, it is appropriate to conclude that Congress deliberately used similar language with the intent that it should be given a similar meaning. The scope and meaning of this language was defined by the Supreme Court in *Kordel* v. *United States,* 335 U. S. 345, and in *United States* v. *Urbuteit,* 335 U. S. 355. Again, it is fair to assume that if Congress had intended to limit the meaning of "label", it would have used language appropriate for this purpose. Its failure to do so leads to the inescapable conclusion that Congress intended "label" in the Poultry Products Inspection Act to have the full scope ascribed to "labeling" by the Court in *Kordel* and *Urbuteit.*

The suggestion, therefore, by the District Court in its opinion below that the Act does not preclude an additional label not approved by the Department of Agriculture plainly misconstrues the Congressional intent. There is no warrant for the District Court's assumption that 7 C. F. R. section 81.127 is meant to be limited in its application to that portion of a label which contains the mandated information. This regulation, prohibiting the printing of a label prior to approval by the Administrator, contains no modification of the statutory definition of "label". Therefore, the label which must be found by the Administrator to be acceptable will include all written, printed, or graphic material on the shipping container, the immediate container and accompanying such product. Indeed, it is plain from *Kordel* and *Urbuteit* that additional information concerning the product would be subjected to this prior approval procedure even if the additional material were to be shipped separately from the product. Hence, it is unrealistic as well as contrary to the clear mandate of the statute, to suggest that appellants could in some manner attach an additional label to their stuffed turkeys which would satisfy the New York requirements without receiving the prior approval of the Federal Administrator.

Respectfully submitted,

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of label). Therefore, the label which may be found by the Administrator to be [illegible], written, printed, or graphic matter on the shipping containers [illegible] and accompanying such product [illegible] and [illegible] that [illegible]. [illegible] the product would be [illegible] the price [illegible] the [illegible] charged separately from the product. [illegible] the [illegible] of the [illegible], to [illegible] label [illegible] attack and [illegible] in [illegible] which would [illegible]. Such a [illegible] approval. [illegible] Federal Administrator.

Respectfully submitted,

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APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
63 Civil 3085

◆

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,
Plaintiffs,

—v.—

DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,
Defendant.

◆

Before:

FRIENDLY, *Circuit Judge,*
CROAKE and WYATT, *District Judges.*

◆

Action by packers of frozen stuffed turkeys processed outside New York State for declaratory judgment affirming their right to sell in New York for resale turkeys labelled as to weight in a manner satisfying the requirements of the United States Department of Agriculture, and seeking to enjoin the New York Commissioner of Agriculture and Markets from interfering with such sales by reason of New York's weight labelling requirements.

◆

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E. GORDON ROBBINS (Evans, Orr, Gourlay & Pacelli, New York, New York), *for Armour and Company.*

PHILIP KAHANER and LESTER ESTERMAN (Louis J. Lefkowitz, Attorney General for the State of New York), *for the State of New York.*

◆

FRIENDLY, *Circuit Judge*:

Swift & Co. and Armour & Co. pack frozen stuffed turkeys in Minnesota and Wisconsin. They ship the turkeys into New York for sale to retailers who resell them to consumers. The turkeys are labelled so as to show the total weight of the stuffed bird, as required by the United States Department of Agriculture. The packers have brought this action against the Commissioner of Agriculture and Markets of New York seeking a declaration of their right to sell turkeys in New York under the federally approved label and an injunction against the New York Commissioner's interfering with such sales by enforcing § 193 of New York's Agriculture and Markets Law and regulations issued thereunder which he construes as requiring a statement of the net weight of the unstuffed turkeys as well as of the stuffed birds—a statement which the plaintiffs contend would not be federally approved or allowed.

The complaint alleged that § 193 of the Agriculture and Markets Law and action threatened by the Commissioner under it violated the plaintiffs' rights under the commerce and supremacy clauses of the Federal Constitution and the due process and equal protection clauses of the Fourteenth Amendment. Plaintiffs requested that a three-judge court be called to hear and determine the case pursuant to 28 U. S. C. § 2281. Believing that the case might be within that section, Judge Croake, to whom the application came, caused such a court to be assembled as provided in 28 U. S. C. § 2284. For reasons that will later appear, we think it best to take what might seem the unorthodox course of discussing the merits before we address ourselves to the puzzling question, which the parties have not disputed, whether the case is appropriate for a three-judge court under § 2281.

Section 193-3 of New York's Agriculture and Markets Law provides:

> "All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the Commissioner."

When the action was brought, the relevant regulation, § 221.40, stated:

> "Meat, poultry and fish shall be sold or offered for sale as food at retail by net weight only." [1]

Neither the statute nor the regulation defines "net weight." The Director of the Bureau of Weights and Measures of the Department testified that he interpreted the regulation, as applied to stuffed turkeys, to require statement of the net weight both of the unstuffed and of the stuffed bird, and that, when asked, he so advised local sealers of weights and measures.

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[1] This was incorporated, effective March 1, 1964, in § 221.9(c), which provides:

> "Except for immediate consumption on the premises where sold or as one of several elements comprising a ready-to-eat meal sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat food products, poultry (whole or parts) and all seafood except shellfish, offered or exposed for sale or sold, as food shall be offered or exposed for sale and sold by net weight."

The history of the regulation, promulgated after a hearing by the Commissioner to consider an alternative containing an exception "that stuffed poultry, when plainly labeled as such and with the words 'including stuffing' appearing as part of the net weight marking of the combined poultry and stuffing may be sold or offered for sale by the net weight of the combined poultry and stuffing," leaves little doubt that this was an admissible interpretation of the regulation. We are also confident that, in view of the lack of statutory definition of "net weight," the New York courts would hold a regulation having this effect to be within the authority conferred on the Commissioner specifically by § 193-3 and more generally by § 196-a. See *Mounting & Finishing Co.* v. *McGoldrick,* 294 N. Y. 104 (1945). We further hold that the state has taken and has threatened to take action that will prevent the sale of plaintiffs' turkeys unless they comply with the regulation as so interpreted, overruling the state's unpersuasive contention that plaintiffs have been the victims of uncoordinated but uniform acts by a number of local sealers.

Plaintiffs now weigh the turkeys at their packing plants outside New York after stuffing and immediately before freezing. They do not deny they can adjust their operation so as to comply with the New York regulation as interpreted by the Commissioner, although this would allegedly involve a total of three weighings—one before stuffing, one after, and another when the giblets have been added and the completed product is placed in a Cryovac bag. Swift's witness testified that 200 birds can be weighed per hour; Armour weighs 300. Two additional weighings would thus take Armour somewhat less and Swift somewhat more than a half minute per bird.[2] Since the birds are frozen immediately after the weighing, there would seem to be no difficulty in plaintiffs' making the extra weighings and affixing the added labels only for the approximate quantity intended for shipment to New York; in any event the record contains nothing to show this would not be practicable.

I.

The contention that New York's regulation is rendered invalid by the commerce clause alone is not substantial. The Commissioner showed that the stuffing constitutes a considerable portion of the net weight of the stuffed bird and also that there can be significant variations in the weight of stuffing in birds of the same size, even when the processing is done by such reputable packers as the plaintiffs and *a fortiori* when it is not. Hence a label showing only the net weight of the stuffed bird may not fully inform the buyer what he is getting. Protection of the public against false weights and measures or misleading statements about them is one of the oldest exercises of governmental regulatory power. "The control of weights and measures appears in the Anglo-Saxon laws, and in legislation during the next thousand years." Plucknett, A Concise History of the Common Law (1956), 448 fn. 2. The barons of the 13th century considered the subject sufficiently important for mention in the 35th Chapter of Magna Carta.[3] A weighing house where goods brought into and out of the city of New Amsterdam "subject to the measure either of the Skepel or Weight" must be weighed and measured "by the sworn Weighmaster and Measurer," see O'Callaghan, Laws and Ordinances of New Netherland, 174-75 (1868), was established in 1654; the local New York sealers, of whose activities Swift and Armour complain, can be traced back to the Act of June 19, 1703, Laws of the Colony of New York, 554.

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[2] This is on the assumption that two added weighings are needed. In fact the evidence indicated that, in lieu of the present practice whereby the stuffed bird is weighed after being placed in a Cryovac bag, for which appropriate adjustment is made, it would be possible simply to weigh the unstuffed and the stuffed bird and then add a previously determined weight of the giblets. On this basis only one extra weighing of the bird would be required.

[3] "There shall be one measure of wine throughout our whole kingdom, and one measure of ale, and one measure of grain, that is the

That the framers of the Constitution did not intend that laws of such ancient vintage in New York and other states[4] must yield to an unexercised national authority in the case of goods coming from outside the state is obvious from the mere statement. But the point is further demonstrated by the provision in Article I, § 10, that "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports and Exports, except what may be absolutely necessary for executing its inspection Laws . . ."—a provision as to which The Federalist thought it enough to say "that the manner in which the restraint is qualified, seems well calculated at once to secure to the States a reasonable discretion in providing for the conveniency of their imports and exports; and to the United States a reasonable check against the abuse of this discretion." The Federalist No. 44. There could hardly be a fitter subject for state inspection than weights, see *Patapsco Guano Co.* v. *Board of Agriculture of North Carolina,* 171 U. S. 345, 358, 361 (1898), and the same principle that permits a state to prohibit the sale of articles bearing an improper statement as to weight allows it to insist on statements that it reasonably consid-

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London quarter, and one width of dyed cloth and of russets and of halbergets, that is two ells within the selvages; of weights, moreover, it shall be as of measure."

[4] See, e.g., the Massachusetts Act of 1647, Massachusetts Colonial Laws, pp. 199-200.

ers to be proper. It is in no way fatal to a regulation of this sort, which does not operate so as to favor local competitors, that compliance may require out-of-state manufacturers to alter their processes, when this is not unduly burdensome. The *Patapsco* case and *Savage* v. *Jones,* 225 U. S. 501 (1912), are sufficient authority. The claims under the Fourteenth Amendment are so patently baseless that we mention them only to show they were not overlooked.

II.

In contrast to the lack of merit in plaintiffs' contentions that New York's requirements violate these constitutional provisions, their argument that the Supremacy Clause forbids enforcement of New York's regulation because of the federal Poultry Products Inspection Act of 1957, 21 U. S. C. §§ 451-469, 71 Stat. 441-49, raises most serious issues, to which we now turn.

The Act contains an initial section, 21 U. S. C. § 451, making legislative findings as to the national interest in favor of wholesome poultry products and against unwholesome or adulterated ones, as to the impracticability of inspecting poultry and poultry products that enter into the stream of interstate commerce without also inspecting all poultry and poultry products processed in the same establishment, and as to the importance of protecting "interstate commerce in poultry and poultry products inspected for wholesomeness, from being adversely burdened, obstructed, or affected by uninspected poultry or poultry products" in large metropolitan markets. The second section, 21 U. S. C. § 452, declares it "to be the policy of Congress to provide for the inspection of poultry and poultry products by the inspection service as herein provided to prevent the movement in interstate or foreign commerce or in a designated major consuming area of poultry products which are unwholesome, adulterated, or otherwise unfit for human food." The following sections, 21 U. S. C. §§ 453-456, contain definitions, authorize the designation of major consuming areas within which federal controls will govern local as well as interstate commerce in poultry, and provide for inspection of carcasses and of the premises themselves.

The next two sections, 21 U. S. C. §§ 457 and 458, contain the provisions on which plaintiffs particularly rely. Section 457, entitled "Labeling" provides:

> "(a) *Requirements for shipping and immediate containers.*
>
> . . . Each immediate container of any poultry product inspected under the authority of this chapter and found to be wholesome and not adulterated shall at the time such product leaves the official establishment bear, in addition to the official inspection mark, in distinctly legible form, the name of the product, a statement of ingredients if fabricated from two or more ingredients including a declaration as to artificial flavors, colors, or preservatives, if any, the net weight or other appropriate measure of the contents, the name and address of the processor and the approved plant number of the official establishment in which the contents were processed. * * * The Secretary may permit reasonable variations and grant exemptions from the foregoing labeling requirements in any manner not in conflict with the purposes of this chapter.
>
> "(b) *False or misleading labeling.*
>
> The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this chapter or the container thereof which is false or misleading in any particular is prohibited. No poul-

try products inspected or required to be inspected pursuant to the provisions of this chapter shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Secretary, he may request a hearing, but the use of the label shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless within thirty days after the receipt of notice of such final determination the person adversely affected thereby appeals to the United States court of appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit."

Section 458 prohibits various acts, including:

"(c) Falsely making or issuing, altering, forging, simulating, or counterfeiting any official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, used in connection with the inspection of poultry or poultry products under this chapter, or causing, procuring, aiding, assisting in, or being a party to, such false making, issuing, altering, forging, simulating, or counterfeiting, or knowingly possessing, without promptly notifying the Secretary of Agriculture or his representative, uttering, publishing, or using as true, or causing to be uttered, published, or used as true, any such falsely made or issued, altered, forged, simulated, or counterfeited official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, or representing that any poultry or poultry product has been officially inspected under the authority of this chapter when such poultry or poultry product has in fact not been so inspected.

"(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product."

Pursuant to 21 U. S. C. § 463, the Secretary of Agriculture has issued regulations to carry out the Poultry Inspection Act, the most pertinent of which we quote in the margin.[5]

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[5] CFR § 81.125:

"Except as may be authorized by the Administrator with respect to shipment of products between official establishments, each shipping container and each immediate container of any product shall at the time it leaves the official establishment bear approved labels containing information in accordance with the provisions set forth in §§ 81.126 to 81.146, inclusive, and the act."

7 CFR § 81.127:

"No label, except printer's proofs bearing official identification shall be printed until the printer's proof or a photostatic copy has been found by the Administrator to be acceptable . . . "

7 CFR § 81.130:

"(a) Each label approved for use on an immediate container for poultry products shall bear in distinctly legible form the following information;

(1) The common or usual name of the poultry product.

(2) A statement of ingredients if fabricated from two or more ingredients, including a declaration as to artificial flavors,

It is undisputed that the Administrator has approved labels for plaintiffs' frozen stuffed turkeys which show only

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colors or preservatives, if any. Such ingredients shall be listed by their common or usual names in the order of their descending proportions. * * *

(3) The net weight or other appropriate measure of the contents, except that the Administrator may approve the use of labels for certain types of immediate containers which do not bear the net weight: . . . The net weight marked on containers of poultry products shall be the net weight of the poultry products and shall not include the weights of the wet or dry packaging materials and giblet wrapping materials.

(4) The name and address of the packer or distributor and when the name of the distributor is shown, it shall be qualified by such term as 'packed for,' 'distributed by,' or 'distributors.'

(5) The official inspection mark.

* * * * *

"(c) Any label which bears the official inspection mark or any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of the regulations shall not bear any statement that is false or misleading. If the Administrator has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Administrator may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Administrator, he may request a hearing, but the use of the label shall, if the Administrator so directs, be withheld pending hearing and final determination by the Administrator. Any person so denied the approval of any label shall be notified promptly of the reasons for the denial. A written application for a hearing with respect to the denial may be filed by said person with the Administrator within 10 days after notice of the denial. Such petition shall state specifically the errors alleged to have been made by the Administrator in denying approval of the label. After consideration of the facts adduced at the hearing, any determination with respect to the matter by the Administrator shall be conclusive unless, within 30 days after the receipt of notice of such final determination, the person adversely affected thereby appeals to the United States Court of Appeals for the Circuit in which he has his principal place of business, or to the United States Court of Appeals for the District of Columbia Circuit. . . ."

the net weight of the stuffed bird. In May, 1963, Swift sought approval of a "revised net weight statement showing separate weight for turkey, dressing and total weight." The Head of the Poultry Products Section, Inspection Branch, Poultry Division, returned the proposed labels with adverse comments. A letter amplified the reasons. These included the impracticability of the consumer's verifying the separate net weights due to absorption of juices by the dressing during defrosting, the possibility that the weight slip attached to the bird at the first weighing might become detached so that wrong weights might be shown, and the danger of bacterial contamination during the time needed for the added weighings. An application by Armour for approval of a label showing separately the net weight of the turkey and of the stuffing but without a total was returned with the comment "The net weight of the poultry product including the stuffing must be shown in lieu of separate net weights." Neither Swift nor Armour requested a hearing as permitted by the statute and the regulations.

A.

We must first consider whether by the mere enactment of the Poultry Inspection Act, Congress so "occupied the field" as to oust all weight regulation by states into which federally inspected poultry or poultry products are shipped, irrespective of the consistency of the state and the federal regulation. Some illumination is afforded by a series of cases that arose shortly after enactment of the Pure Food and Drug Act. The first, *Savage* v. *Jones, supra,* held that the provisions of § 8 prohibiting a package or label that contained false or misleading statements of the contents, 34 Stat. 768, 770 (1906), did not invalidate a state statute requiring a tag or label affirmatively disclosing the ingredients. In contrast, at the next term, the Court decided that when the Secretaries of the Treasury, of Agriculture and of Commerce and Labor, had found that a syrup was not misbranded if labelled "corn syrup with cane flavor," a state could not require cans of the syrup sold at retail to be labelled instead "Glucose flavored with Refiner's Syrup." *McDermott* v. *Wisconsin,* 228 U. S. 115 (1913); the Court had no occasion to consider whether the state might require this as an additional label. The trilogy was completed by *Corn Products Refining Co.* v. *Eddy,* 249 U. S. 427 (1919), holding that federal approval of labelling as corn syrup did not prevent a state from requiring that the cans also bear a statement of ingredients.

Multiplication of references to Supreme Court decisions in this general area would serve no useful purpose; it suffices for the present to cite the last bracketing pair, both decided by the narrowest of margins. *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132 (1963), sustained California's prohibition of the sale of avocados containing less than 8% of oil by weight, as applied to Florida avocados whose maturity on picking was already controlled by compliance with regulations promulgated by the Secretary of Agriculture with special reference to Florida avocados, and which were certified by a Federal-State Inspection Service pursuant to regulations issued by the Secretary under the Agricultural Adjustment Act, 7 U. S. C. §§ 601 *et seq.,* 48 Stat. 31 (1933). The Court reaffirmed that "The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." 373 U. S. at 142. As against this *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148 (1942), had prohibited Alabama from seizing packing stock butter, not meeting the state standard, which had been acquired by an Alabama processor for use in manufacturing renovated butter for transportation in interstate commerce under federal regulations, Internal Revenue Code of 1939, §§ 2320-27, 53 Stat. 252. The *Florida Avocado Growers* majority distinguished *Cloverleaf* on the basis that "Congressional regulation of one end of the stream of commerce does not, ipso facto, oust all state regulation at the other end," 373 U. S. at 145, and pointed to the differences recognized in *Cloverleaf* "between a confiscation which interferes with production under federal supervision and confiscation after production because of a higher standard demanded by a state for its consumers. The latter type is permissible under all the authorities." 315 U. S. at 162.[6] This distinction necessarily recognizes that it is not inevitably unconstitutional for a state desiring "a higher standard" for the protection of its consumers to confront a manufacturer in another state with the alternatives of taking steps not required by applicable federal law or not selling his goods in the enacting state.

The general scheme of the Poultry Products Inspection Act does not suggest a Congressional purpose to create an exclusive system of regulation of the marketing of poultry; in particular it does not suggest an intent to oust the states of their historic undertaking to safeguard their people from improper statements of weight. The legislative findings, 21 U. S. C. § 451, and the declaration of policy, 21 U. S. C. § 452, speaking of the need for protection against unwholesome poultry products and of the importance of providing for inspection "to prevent the movement in . . . commerce . . . of poultry products which are unwholesome, adulterated or otherwise unfit . . . ", do not carry the implication that any of these objectives would be frustrated if the states were to impose supplemental regulations, at the end of the stream of commerce, to insure accomplishment of these ends—much less if the receiving states should further regulate a subject which the federal Act touches so slightly as weights. While the Act contains the quoted provisions as to labelling, these are merely incidental to the primary provisions for inspection of poultry products. Passage of the Act did not result from any belief on the part of Congress that there were serious weight or labelling abuses demanding correction; neither the legislative findings nor the declaration of policy make any reference to these subjects. In the entire statute, stretching over nine pages in the Statutes at Large, the sole reference to disclosure of weight consists of one short clause. The House Report, No. 465, 85th Cong., 1st Sess. 1957; 2 U. S. Code Cong. & Adm. News 1957, pp. 1632-33, and the Senate Report, No. 195, 85th Cong., 1st Sess., 1957, say nothing on the subject save for a passing mention of a statement of "the quantity" in paraphrasing the labelling section where this clause appears.

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[6] The *Avocado Growers* dissenters criticized this statement as a reference to "the uncited 'all the authorities,' which appear to be non-existent." 373 U. S. at 174.

Insofar as plaintiffs contend that the extra weighings needed to meet New York's requirement frustrates the primary Congressional purpose by impairing the wholesomeness of the product, we reject the claim as wholly contrary to the evidence. The weighings would add something like half a minute to the 45 minutes in which the birds are now exposed between their bath in ice slush and their entry into the freezer; Armour's plant superintendent admitted, with commendable candor, that the small additional time and handling would have no adverse effect.[7]

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[7] It is true that danger of contamination resulting from additional weighings was one of the reasons given in the letter of an official of the Department of Agriculture explaining to Swift the rejection of its labelling proposal. But since this reason was not

For reasons already indicated in part, we likewise cannot conclude that a state requirement of a more detailed declaration of weights was ruled out by mere enactment of the federal statute. Although the Secretary of Agriculture may have reasonable leeway to determine what net weight shall be shown on the official federal label and the label provisions of the Act recognize the necessity of protecting the integrity of the "official inspection mark" (21 U. S. C. § 454(j)) and contain a normal prohibition of "false and misleading labeling," there is no basis for assuming that any further statement as to weight that a state may require would necessarily affect the integrity of the official inspection mark or be "false or misleading." To borrow from Mr. Justice Brennan's opinion in the *Florida Avocado Growers* case, the manner of stating the weight of frozen stuffed turkeys in various markets "seems to be an inherently unlikely candidate for exclusive federal regulation," 373 U. S. at 143. There is here a complete absence of the "special and peculiar history" that led the Court to conclude in *Rice* v. *Santa Fe Elevators Corp.,* 331 U. S. 218, 232 (1947), that a more pervasive but non-conflicting state regulation must yield to the amended federal Warehouse Act, 46 Stat. 1463 (1931). There is a marked contrast with the importance attached in *Campbell* v. *Hussey,* 368 U. S. 297 (1961), to the expressed intention to establish *uniform* standards in the Tobacco Inspection Act, 49 Stat. 731 (1935). And the problem is in no wise comparable with that in *Napier* v. *Atlantic Coast Line R.R.,* 272 U. S. 605 (1926), where the decision as to the exclusivity of the Boiler Inspection Act must have been influenced by the paralyzing effect on railroads from

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among those given in the official statement of rejection and since there had been no hearings on the subject, this informal comment cannot be taken as an authoritative statement of the Secretary's position. In any event we should be forced to reject it as unsupported by substantial evidence.

prescription by each state of the safety devices obligatory on locomotives that would pass through many of them. Compare *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761 (1945); *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U. S. 520 (1959). Here, as has been noted, plaintiffs will encounter no serious manufacturing problem in conforming to New York's requirements even though the federal authorities and other states have not gone so far. We conclude that plaintiffs cannot prevail on their general argument as to federal occupation of the field.

B.

We must thus examine not only the precise language of the Poultry Products Inspection Act but also the regulations issued and actions taken thereunder to determine whether an irreconcilable conflict has arisen between what the United States has commanded and what New York requires. *Cloverleaf Butter Co.* v. *Patterson, supra,* 315 U. S. at 155-56; *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra,* 373 U. S. at 146.

We begin by observing that, as we understand New York's position, it does not demand any modification in the weight label adjacent to the Department of Agriculture's official inspection stamp; we shall assume New York would be satisfied, as indeed it must be, so long as somewhere on the container there is a statement of the net weight of the bird before stuffing, on which, if need be, any federal responsibility could be expressly disclaimed. Such a presentation should go a long way toward satisfying the concern expressed in the letter of the Head of the Poultry Products Section of the Department of Agriculture lest an inaccurate statement should occur when an occasional bird, weighed before stuffing, loses its tag in the process—although we would indeed suppose that a technology that has been able to develop computers, space satellites, and supersonic airplanes could find means to conquer this problem.[8] The federally approved label, adjacent to the inspection mark, thus need contain only what it now contains—a recital of the net weight of the stuffed bird as it enters the freezing chamber.

The question thus becomes whether the United States has prohibited plaintiffs from affixing an additional label that will meet New York's requirements. Reading the statute in the manner prescribed in cases of this sort, we find no "unambiguous congressional mandate to that effect." 373 U. S. at 147. Although we assume that the Secretary of Agriculture or his delegate, the Administrator of the Agricultural Marketing Service, is empowered to construe the required statement of "net weight," § 457(a), as referring to the net weight of the stuffed bird, this alone would not outlaw further statements concerning weight so long as these do not obscure or detract from the force of the federally approved label, and so long as they are not presented so as to imply federal approval. Indeed, this view is supported by regulation 81.127, footnote 5 *supra,* which, although confusingly worded, shows concern only for labels which bear official identification. Consistent with this, we read the communications from the Department as merely rejecting the particular labels submitted for approval and not as attempting to rule broadly that any supplementary labelling of weight in addition to that satisfying the Department would be unlawful.

Neither can we sustain Swift and Armour on the basis that the communications are a finding that a supplementary label satisfying the demands of the New York Commissioner would inevitably be so misleading as to fall within the proscription of the federal statute. When the alleged inconsistency of a state with a federal regulation is not apparent on the face of the two commands but hinges on a factual determination, a citizen desiring freedom from the state regulation does not discharge his burden by obtaining a letter from a subordinate federal official—at least when Congress has laid out a fact-finding procedure as to which the state could be given notice and an opportunity to be heard. Cf. *Federal Power Comm'n* v. *Arkansas Power & Light Co.*, 330 U. S. 802 (1947), reversing *per curiam* the decision of the Court of Appeals for the District of Columbia, 156 F. 2d 821 (1946). The statute, § 457(b), and the regulations, 7 C. F. R. § 81.130(c), provide that a person aggrieved by a determination may request a hearing and, if the preliminary determination is then adhered to, may obtain judicial review. Swift and Armour were obliged at least to pursue the former remedy if this was necessary to obtain a clear determination that any label satisfactory to New York would be banned by the federal Administrator as misleading. We think it highly unlikely that upon a departmental hearing, with New York given the notice that proper respect to its authority would demand, anyone could reasonably find that a separate statement of the weight of the unstuffed bird would be false or misleading. To the contrary, we are convinced by the evidence that the additional statement would make the total impression less misleading than simply having a label which, as was testified, in one instance showed a net weight of 7¼ pounds for a stuffed turkey which, after defrosting, was found to contain 2⅛ pounds of stuffing—even if an occasional turkey might unwittingly strut under another's tag.

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[8] The Department's concern that the purchaser could not precisely verify the statement of weight before stuffing since the stuffing might absorb some of the bird's juices during defrosting would seem a worry more appropriate for New York. Apparently New York has decided that a statement whose policing may require reasonable tolerance is better than none.

III.

We now reach the question, postponed at the outset, whether this is a case seeking an "injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . upon the ground of the unconstitutionality of such statute," 28 U. S. C. § 2281, as to which alone a court of three judges is required. Before March 26, 1962, when the Supreme Court decided *Kesler* v. *Department of Public Safety of Utah,* 369 U. S. 153, the question would have been speedily answered in the negative. Since the claims that application of the New York statute violates the commerce clause or the Fourteenth Amendment are insubstantial, the serious questions that remain are of federal statutory preemption and of conflict between federal and state enactments; these had not been considered to be claims of "unconstitutionality" within § 2281, even though an elegant statement of the argument would end with a reference to the supremacy clause of Article VI of the Constitution. See *Kesler* v. *Department of Public Safety of Utah, supra,* 369 U. S. at 175-76 and fn. 5 (dissenting opinion of the Chief Justice) (1962); Wright, Federal Courts 164 (1963). But, in Professor Wright's language, the *Kesler* decision qualified "the cases which seemed to so hold with a very subtle rule," namely, that § 2281 was applicable when "no question of statutory construction, either of a state or a federal enactment, is in controversy" so that the case "presents a sole, immediate constitutional question," as distinguished from cases "which presented issues of statutory construction even though perhaps eventually leading to a constitutional question," 369 U. S. at 157-58.

When we reflect on what we have written, we think we have indeed construed the Poultry Products Inspection Act, both to determine whether it was meant to oust all state regulation of weights *ex proprio vigore* and to decide whether it bans the statement as to weight on which New York insists. If a problem of statutory construction exists whenever "there is a fair contest between two readings, neither of which comes without respectable title deeds . . . ", Frankfurter, Some Reflections on the Reading of Statutes, in Of Law and Men 45 (1956), it would seem that even under *Kesler* this was a case for a single judge, although Judge Croake in calling for a three-judge court and the Chief Judge of the Circuit in responding to his call could hardly have been expected to foresee just how the case would develop. But the issue is not that simple. The *Kesler* case itself required consideration of the purpose and effect of § 17 of the Bankruptcy Act—an issue on which, indeed, the Justices did not agree. The question therefore is not whether we have engaged in construction of a federal statute *simpliciter,* but whether we have engaged in so much more construction than in *Kesler* as to make that ruling inapplicable.[9] If we were obliged to answer that question, we would say we had. But we see no need to assume a task for which our litmus paper is not sufficiently sensitive to permit an assured answer, and as to which the consequences of a wrong decision in one direction might be so serious. Although a single district judge is without power to act in a case requiring three judges, the opposite is not true, *Phillips* v. *United States,* 312 U. S. 246, 254 (1941); *Public Service Comm. of Missouri* v. *Brashear Freight Lines, Inc.,* 312

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[9] *United States* v. *Georgia Public Service Comm'n,* 371 U. S. 285, 287 (1963), in which the Court requested counsel to brief and argue the applicability of *Kesler,* 369 U. S. 882 (1962), went off on the point that the case presented a substantial question of conflict with the Constitution itself. See also *Borden Co.* v. *Liddy,* 309 F. 2d 871, 874 (8 Cir. 1962), cert. denied, 372 U. S. 953 (1963), and Note, The Three-Judge District Court: Scope and Procedure under Section 2281, 77 Harv. L. Rev. 299, 313-15 (1963), criticizing the *Kesler* decision.

U. S. 621, 626 (1941).[10] Since a return of the case to Judge Croake would result in an invalid order if the return was erroneous, whereas the only consequence of erroneous retention of jurisdiction by the three-judge court is that the appeal should be taken to the Court of Appeals rather than to the Supreme Court, an uncertainty against which the plaintiffs may protect themselves by timely appeals to both courts, see also *Bailey* v. *Patterson,* 369 U. S. 31 (1962); *Turner* v. *City of Memphis,* 369 U. S. 350 (1962), we direct that judgment dismissing the complaint be entered in the name of the three-judge court, at the same time certifying out of abundant caution that Judge Croake individually arrived at the same conclusion that we have reached collectively.

The complaint is dismissed.

HENRY J. FRIENDLY,
U. S. C. J.

THOMAS F. CROAKE,
U. S. D. J.

INZER B. WYATT,
U. S. D. J.

June 10, 1964.

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[10] It is not altogether plain whether the rationale is that the two additional judges are surplus, see *Healy* v. *Ratta,* 67 F. 2d 554, 556 (1 Cir. 1933), reversed on other grounds, 292 U. S. 263 (1934); *O'Malley* v. *United States,* 128 F. 2d 676, 687 (8 Cir. 1942), rev'd on other grounds, 317 U. S. 412 (1943), a theory that would create problems if the district judge to whom the application was initially presented was in disagreement; cf. *Cannonball Transp. Co.* v. *American Stages, Inc.,* 53 F. 2d 1050 (S. D. Ohio 1931); *United States* v. *Query,* 37 F. Supp. 972, 977 (E. D. So. Car.), aff'd 121 F. 2d 631 (4 Cir.), cert. denied, 314 U. S. 685 (1941), cert. granted, 316 U. S. 653, vacated and remanded, 316 U. S. 486 (1942); or that the three judges are sitting as a district court *in banc,* 28 U. S. C. § 132, see *International Longshoremen's Union* v. *Ackerman,* 82 F. Supp. 65, 93-94 (D. Hawaii, 1948), rev'd on other grounds, 187 F. 2d 860 (9 Cir. 1951); and *Wilson & Co.* v. *Freeman,* 179 F. Supp. 520, 524 (D. Minn. 1959); or something else.

APPENDIX B

Statutes

AGRICULTURAL AND MARKETS LAW OF THE STATE OF NEW YORK

§ 193. *Method of sale of food and food products*

1. Definition of "food" and "food product". The terms "food" and "food product" as used in this section shall include all material, solid, liquid or mixed, whether simple or compound, used or intended for consumption by human beings or domestic animals normally kept as household pets and shall also include all substances or ingredients to be added thereto for any purpose.

2. All food and food products which are sold, offered or exposed for sale by wholesalers, packers, distributors or jobbers shall be sold or offered for sale by net weight, numerical count or standard measure, whichever term shall be applicable, and shall be plainly marked by such person or persons offering the food or food products for sale, in such form or manner as may be prescribed by the commissioner, except that it shall not be necessary to so mark meat, meat products or fish, except shellfish in natural form, provided the net weight be stated on a written invoice and on the shipping container of the meat, meat product or fish.

3. All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the commissioner.

4. All food and food products which are packaged or wrapped by the retailer in advance of being exposed or offered for sale by the retailer shall be accurately marked

in such form or manner as may be prescribed by the commissioner, with (a) the net weight or standard measure or numerical count; (b) the selling price per pound or unit of standard measure, and (c) the total selling price.

5. Wherever food or food products are packaged or wrapped for sale by a retailer in advance of being sold or offered for sale, an accurate computing scale shall be maintained so placed as to be easily available to customers.

6. This section shall not apply to sales of (a) eggs, fresh fruits, fresh vegetables, grains and nuts; (b) milk and cream as set forth in section one hundred ninety-one of this chapter; (c) malt beverages as set forth in section one hundred ninety-two-c of this chapter; (d) bread, as set forth in section one hundred ninety-three-a of this chapter; (e) frozen desserts as set forth in section one hundred ninety-three-d of this chapter; (f) alcoholic beverages; and (g) drugs and pharmaceuticals. Added L. 1962, c. 770, § 2; amended L. 1963, c. 377, eff. April 16, 1963.

PUBLIC LAW 85-172

85TH CONGRESS, S. 1747

August 28, 1957

AN ACT

—71 Stat. 441—

To provide for the compulsory inspection by the United States Department of Agriculture of poultry and poultry products.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act [Poultry Products Inspection Act] may be cited as the "Poultry Products Inspection Act".

LEGISLATIVE FINDING

SEC. 2. Wholesome poultry products are an important source of the Nation's total supply of food. Such products are consumed throughout the Nation and substantial quantities thereof move in interstate and foreign commerce. Unwholesome and adulterated poultry products in the channels of interstate or foreign commerce, are injurious to the public welfare, adversely affect the marketing of wholesome poultry products, result in sundry losses to producers, and destroy markets for wholesome poultry products. The marketing of wholesome poultry products is affected with the public interest and directly affects the welfare of the people. All poultry and poultry products which have or are required to have inspection under this Act are either in the current of interstate or foreign commerce or directly affect such commerce. That part that enters directly into the current of interstate or foreign commerce cannot be effectively inspected and regulated without also inspecting and regulating all poultry and poultry products processed or handled in the same establishment.

The great volume of poultry products required as an article of food for the inhabitants of large centers of population may directly affect the movement of poultry and poultry products in interstate commerce. To protect interstate commerce in poultry and poultry products inspected for wholesomeness, from being adversely burdened, obstructed, or affected by uninspected poultry or poultry products, major consuming areas where poultry or poultry products are handled or consumed in such volume as to affect the movement of inspected poultry or poultry products in interstate commerce should be designated by the Secretary pursuant to the provisions of this Act.

DECLARATION OF POLICY

SEC. 3. It is hereby declared to be the policy of Congress to provide for the inspection of poultry and poultry products by the inspection service as herein provided to prevent the movement in interstate or foreign commerce or in a designated major consuming area of poultry products which are unwholesome, adulterated, or otherwise unfit for human food.

DEFINITIONS

SEC. 4. For purposes of this Act—

(a) The term "commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State or the District of Columbia, but through any place outside thereof; or within the District of Columbia.

(b) The term "Secretary" means the Secretary of Agriculture.

(c) The term "person" means any individual, partnership, corporation, association, or any other business unit.

(d) The term "poultry" means any live or slaughtered domesticated bird.

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(e) The term "poultry product" means any poultry which has been slaughtered for human food from which the blood, feathers, feet, head, and viscera have been removed in accordance with rules and regulations promulgated by the Secretary, any edible part of poultry, or, unless exempted by the Secretary, any human food product consisting of any edible part of poultry separately or in combination with other ingredients.

(f) The term "wholesome" means sound, healthful, clean, and otherwise fit for human food.

(g) The term "unwholesome" means:

(1) Unsound, injurious to health, or otherwise rendered unfit for human food.

(2) Consisting in whole or in part of any filthy, putrid, or decomposed substance.

(3) Processed, prepared, packed, or held under unsanitary conditions whereby a poultry carcass or parts thereof or any poultry product may have become contaminated with filth or whereby a poultry product may have been rendered injurious to health.

(4) Produced in whole or in part from poultry which has died otherwise than by slaughter.

(5) Packaged in a container composed of any poisonous or deleterious substance which may render the contents injurious to health.

(h) The term "adulterated" shall apply to poultry and poultry products under one or more of the following circumstances:

(1) If they bear or contain any poisonous or deleterious substance which may render them injurious to health; but, in case the substance is not an added substance, such poultry and poultry products shall not be considered adulterated under this clause if the quantity of such substance in such poultry and poultry products does not ordinarily render them injurious to health.

(2) If they bear or contain any added poisonous or added deleterious substance, unless such substance is permitted in their production or unavoidable under good manufacturing practices as may be determined by rules and regulations hereunder prescribed by the Secretary or other provisions of Federal law limiting or tolerating the quantity of such added substance on or in such poultry and poultry products: *Provided,* That any quantity of such added substance exceeding the limits so fixed shall also be deemed to constitute adulteration.

(3) If any substance has been substituted, wholly or in part, therefor.

(4) If damage or inferiority has been concealed in any manner.

(5) If any valuable constituent has been in whole or in part omitted or abstracted therefrom.

(6) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

(i) The term "inspector" means: (1) an employee or official of the United States Government authorized by the Secretary to inspect poultry and poultry products under the authority of this Act, or (2) any employee or official of any State government authorized by the Secretary to inspect poultry and poultry products under authority of this Act, under an agreement entered into between the Secretary and the appropriate State agency.

(j) The term "official inspection mark" means the symbol, formulated pursuant to rules and regulations prescribed by the Secretary, stating that the product was inspected.

(k) The term "inspection service" means the official Government service within the Department of Agriculture

—71 Stat. 443—

designated by the Secretary as having the responsibility for carrying out the provisions of this Act.

(l) The terms "container" or "package" include any box, can, tin, cloth, plastic, or any other receptacle, wrapper, or cover.

(m) The term "official establishment" means any establishment as determined by the Secretary at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained under the authority of this Act.

(n) The term "label" means any written, printed, or graphic material upon the shipping container, if any, or upon the immediate container, including but not limited to an individual consumer package, of the poultry product, or accompanying such product.

(o) The term "shipping container" means any container used or intended for use in packaging the product packed in an immediate container.

(p) The term "immediate container" includes any consumer package; or any other container in which poultry carcasses or poultry products, not consumer packaged, are packed.

DESIGNATION

SEC. 5. Upon application by any appropriate State or local official or agency of a substantial portion of any major consuming area or upon application by an appropriate local poultry industry group in such an area, where the Secretary has reason to believe that poultry or poultry products are handled or consumed in such volume as to affect, burden, or obstruct the movement of inspected poultry products in interstate commerce, the Secretary shall conduct a public hearing to ascertain whether or not it will tend to effectuate the purposes of this Act for such area to be subject to the provisions of this Act. If after public hearing the Secretary finds that poultry or poultry products are handled or consumed in such volume as to affect, burden, or obstruct the movement of inspected poultry products in commerce and that the designation of such area will tend to effectuate the purposes of this Act, he shall by order designate such area and prescribe the provisions of this Act which shall be applicable thereto and grant such exemptions therefrom as he determines practicable. Such designation [Publication in F. R.] shall not become effective until six months after the notice thereof is published in the Federal Register. On and after the effective date of such designation, all poultry and poultry products processed, sold, received, or delivered in any such area shall be subject to the provisions of this Act.

ANTE MORTEM AND POST MORTEM INSPECTION, REINSPECTION, AND QUARANTINE

SEC. 6. (a) For the purpose of preventing the entry into or flow or movement in commerce or a designated major consuming area of any poultry product which is unwholesome or adulterated, the Secretary shall, where and to the extent considered by him necessary, cause to be made by inspectors ante mortem inspection of poultry in any official establishment processing poultry or poultry products for commerce or in, or for marketing in a designated city or area.

(b) The Secretary, whenever processing operations are being conducted, shall cause to be made by inspectors post mortem inspection of the carcass of each bird processed, and at any time such quarantine, segregation, reinspection as he deems necessary of poultry and poultry products in each official establishment processing such poultry or poultry products for commerce or in, or for marketing in a designated city or area.

—71 Stat. 444—

(c) All poultry carcasses and parts thereof and poultry products found to be unwholesome or adulterated shall be condemned and shall, if no appeal be taken from such determination of condemnation, be destroyed for human food purposes under the supervision of an inspector: *Provided*, That carcasses, parts, and products, which may by reprocessing be made not unwholesome and not adulterated, need not be so condemned and destroyed if so reprocessed under the supervision of an inspector and thereafter found to be not unwholesome and not adulterated. If an appeal be taken from such determination, the carcasses, parts, or products shall be appropriately marked and segregated pending completion of an appeal inspection, which appeal shall be at the cost of the appellant if the Secretary determines that the appeal is frivolous. If the determination of condemnation is sustained the carcasses, parts, and products shall be destroyed for human food purposes under the supervision of an inspector.

Sanitation, Facilities, and Practices

SEC. 7. (a) Each official establishment slaughtering poultry or processing poultry products for commerce or in or for marketing in a designated major consuming area shall have such premises, facilities, and equipment, and be operated in accordance with such sanitary practices, as are required by regulations promulgated by the Secretary for the purpose of preventing the entry into or flow or movement in commerce or in a designated major consuming area, of poultry products which are unwholesome or adulterated.

(b) The Secretary shall refuse to render inspection to any establishment whose premises, facilities, or equipment, or the operation thereof, fail to meet the requirements of this section.

LABELING

SEC. 8. (a) Each shipping container of any poultry product inspected under the authority of this Act and found to be wholesome and not adulterated, shall at the time such product leaves the official establishment bear, in distinctly legible form, the official inspection mark and the approved plant number of the official establishment in which the contents were processed. Each immediate container of any poultry product inspected under the authority of this Act and found to be wholesome and not adulterated shall at the time such product leaves the official establishment bear, in addition to the official inspection mark, in distinctly legible form, the name of the product, a statement of ingredients if fabricated from two or more ingredients including a declaration as to artificial flavors, colors, or preservatives, if any, the net weight or other appropriate measure of the contents, the name and address of the processor and the approved plant number of the official establishment in which the contents were processed. The name and address of the distributor may be used in lieu of the name and address of the processor if the approved plant number is used to identify the official establishment in which the poultry product was prepared and packed. The Secretary may permit reasonable variations and grant exemptions from the foregoing labeling requirements in any manner not in conflict with the purposes of this Act.

(b) The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this Act or the container thereof which is false or misleading in any particular is prohibited. No poultry products inspected or required to be inspected pursuant to the provisions of this Act shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Secretary, he may request a hearing, but the use of the label shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless within thirty days after the receipt of notice of such final determination the person adversely affected thereby appeals to the United States court of appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 204 of the Packers and Stockyards Act of 1921 [42 Stat. 162], as amended [7 U. S. C. 194], shall be applicable to appeals taken under this section.

—71 Stat. 445—

PROHIBITED ACTS

SEC. 9. The following acts or the causing thereof are hereby prohibited:

(a) The processing, sale or offering for sale, transportation, or delivery or receiving for transportation, in commerce or in a designated major consuming area of any poultry product, unless such poultry product has been inspected for wholesomeness and unless the shipping container, if any, and the immediate container are marked in accordance with the provisions of this Act.

(b) The sale or other disposition for human food of any poultry or poultry product which has been inspected and declared to be unwholesome or adulterated under this Act.

(c) Falsely making or issuing, altering, forging, simulating, or counterfeiting any official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, used in connection with the inspection of poultry or poultry products under this Act, or causing, procuring, aiding, assisting in, or being a party to, such false making, issuing, altering, forging, simulating, or counterfeiting, or knowingly possessing, without promptly notifying the Secretary of Agriculture or his representative, uttering, publishing, or using as true, or causing to be uttered, published, or used as true, any such falsely made or issued, altered, forged, simulated, or counterfeited official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, or representing that any poultry or poultry product has been officially inspected under the authority of this Act when such poultry or poultry product has in fact not been so inspected.

(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product.

(e) The use of any container bearing an official inspection mark except for the poultry product in the original form in which it was inspected and covered by said mark unless the mark is removed, obliterated, or otherwise destroyed.

(f) The refusal to permit access by any duly authorized representative of the Secretary, at all reasonable times, to the premises of an establishment engaged in processing poultry or poultry products for commerce, or in or for marketing in a designated major consuming area, upon presentation of appropriate credentials.

(g) The refusal to permit access to and the copying of any record as authorized by section 11 of this Act.

—71 Stat. 446—

(h) The using by any person to his own advantage, or revealing, other than to the authorized representatives of the Government in their official capacity, or to the courts when relevant in any judicial proceeding under this Act, any information acquired under the authority of this Act, concerning any matter which as a trade secret is entitled to protection.

(i) Delivering, receiving, transporting, selling, or offering for sale or transport for human consumption any slaughtered poultry or any part thereof, separately or in combination with other ingredients (other than poultry products as defined in this Act), in commerce or from an official establishment or in a designated major consuming area, except as may be authorized by and pursuant to rules and regulations prescribed by the Secretary.

COMPLETE COVERAGE OF OFFICIAL ESTABLISHMENTS

SEC. 10. No establishment processing poultry or poultry products for commerce or in or for marketing in a designated major consuming area shall process any poultry or poultry product except in compliance with the requirements of this Act.

RECORDS OF INTERSTATE SHIPMENT

SEC. 11. For the purpose of enforcing the provisions of this Act, persons engaged in the business of processing, transporting, shipping, or receiving poultry slaughtered for human consumption or poultry products in commerce or in a designated major consuming area, or holding such products so received shall maintain records showing, to the extent that they are concerned therewith, the receipt, delivery, sale, movement, or disposition of poultry and poultry products and shall, upon the request of a duly authorized representative of the Secretary, permit him at reasonable times to have access to and to copy all such records. Any record required to be maintained by this section shall be maintained for a period of two years after the transaction, which is the subject of such record, has taken place.

PENALTIES

SEC. 12. (a) Any person who violates the provisions of section 9, 10, 11, or 17, shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than six months, or a fine of not more than $3,000, or both such imprisonment and fine; but if such violation is committed after one conviction of such person under this section has become final such person shall be subject to imprisonment for not more than one year, or a fine of not more than $5,000, or both such imprisonment and fine; but if such violation is committed after two or more convictions of such person under this section have become final such person shall be subject to imprisonment for not more than two years, or a fine of not more than $10,000, or both such imprisonment and fine. When construing or enforcing the provisions of said sections the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association within the scope of his employment or office shall in every case be deemed the act, omission, or failure of such individual, partnership, corporation, or association, as well as of such person.

(b) No carrier shall be subject to the penalties of this Act, other than the penalties for violation of section 11, by reason of his receipt, carriage, holding, or delivery, in the usual course of business, as a carrier, of slaughtered poultry or poultry products, owned by another person unless the carrier has knowledge, or is in possession of facts which

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would cause a reasonable person to believe that such slaughtered poultry or poultry products were not inspected or marked in accordance with the provisions of this Act or were not otherwise eligible for transportation under this Act.

REPORTING OF VIOLATIONS

SEC. 13. Before any violation of this Act is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given reasonable notice of the alleged violation and opportunity to present his views orally or in writing with regard to such contemplated proceeding. Nothing in this Act shall be construed as requiring the Secretary to report for criminal prosecution violations of this Act whenever he believes that the public interest will be adequately served and compliance with the Act obtained by a suitable written notice or warning.

REGULATIONS

SEC. 14. The Secretary shall promulgate such rules and regulations as are necessary to carry out the provisions of this Act.

EXEMPTIONS

SEC. 15. (a) The Secretary shall, by regulation and under such conditions as to sanitary standards, practices, and procedures as he may prescribe, exempt from specific provisions of this Act—

(1) poultry producers with respect to poultry of their own raising on their own farms which they sell directly to household consumers or restaurants, hotels, and boarding houses for use in their own dining rooms or in the preparation of meals for sales direct to consumers only: *Provided,* That such poultry producers do not engage in buying or selling poultry products other than those produced from poultry raised on their own farms;

(2) retail dealers with respect to poultry products sold directly to consumers in individual retail stores, if the only processing operation performed by such retail dealers is the cutting up of poultry products on the premises where such sales to consumers are made;

(3) for such period of time as the Secretary determines that it would be impracticable to provide inspection and exemption will aid in the effective administration of this Act, any person engaged in the processing of poultry or poultry products for commerce and the poultry or poultry products processed by such person: *Provided, however,* That no such exemption shall continue in effect on and after July 1, 1960; and

(4) persons slaughtering, processing, or otherwise handling poultry or poultry products which have been or are to be processed as required by recognized religious dietary laws, to the extent that the Secretary determines necessary to avoid conflict with such requirements while still effectuating the purposes of this Act.

(b) The Secretary may by order suspend or terminate any exemption under this section with respect to any person whenever he finds that such action will aid in effectuating the purposes of this Act.

—71 Stat. 448—

VIOLATIONS BY EXEMPTED PERSONS

SEC. 16. Any person who sells, delivers, transports or offers for sale or transportation in commerce or in a designated major consuming area any poultry or poultry products which are exempt under section 15, and which are unwholesome or adulterated and are intended for human consumption, shall be guilty of a misdemeanor and shall on conviction thereof be subject to the penalties set forth in section 12.

IMPORTS

SEC. 17. (a) No slaughtered poultry, or parts or products thereof, of any kind shall be imported into the United States unless they are healthful, wholesome, fit for human food, not adulterated, and contain no dye, chemical, preservative, or ingredient which renders them unhealthful, unwholesome, adulterated, or unfit for human food and unless they also comply with the rules and regulations made by the Secretary of Agriculture to assure that imported poultry or poultry products comply with the standards provided for in this Act. All imported, slaughtered poultry, or parts or products thereof, shall after entry into the United States in compliance with such rules and regulations be deemed and treated as domestic slaughtered poultry, or parts or products thereof, within the meaning and subject to the provisions of this Act and the Federal Food, Drug, and Cosmetic Act [52 Stat. 1040], and Acts amendatory of [21 U. S. C. 301], supplemental to, or in substitution for such Acts.

(b) The Secretary of Agriculture is authorized to make rules and regulations to carry out the purposes of this section and in such rules and regulations the Secretary of Agriculture may prescribe the terms and conditions for the destruction of all slaughtered poultry, or parts or products thereof, offered for entry and refused admission into the United States unless such slaughtered poultry, or parts or products thereof, be exported by the consignee within the time fixed therefor in such rules and regulations.

(c) All charges for storage, cartage, and labor with respect to any product which is refused admission pursuant to this section shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any other products imported thereafter by or for such owner or consignee.

GENERAL PROVISIONS

SEC. 18. (a) For the purpose of preventing and eliminating burdens on commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this Act shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act, as amended [21 U. S. C. 301], to the extent of the application or the extension thereto of the provisions of this Act.

(b) In carrying out the provisions of this Act, the Secretary may cooperate with other branches of Government and with State agencies and may conduct such examinations, investigations, and inspections as he determines practicable through any officer or employee of a State commissioned by the Secretary for such purpose.

COST OF INSPECTION

SEC. 19. The cost of inspection rendered under the requirements of this Act, shall be borne by the United States, except that the cost of overtime and holiday work performed in establishments subject to the provisions of this Act at such rates as the Secretary may determine shall be borne by such establishments. Sums received by the Secretary in

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reimbursement for sums paid out by him for such premium pay work shall be available without fiscal year limitation to carry out the purposes of this section.

APPROPRIATIONS

SEC. 20. There is hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

SEPARABILITY OF PROVISIONS

SEC. 21. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

EFFECTIVE DATE

SEC. 22. This Act shall take effect upon enactment, except that no person shall be subject to the provisions of this Act prior to January 1, 1959, unless such person after January 1, 1958, applies for and receives inspection for poultry or poultry products in accordance with the provisions of this Act and pursuant to regulations promulgated by the Secretary hereunder, in any establishment processing poultry or poultry products in commerce or in a designated major consuming area. Any person who voluntarily applies for and receives such inspection after January 1, 1958, shall be subject, on and after the date he commences to receive such inspection, to all of the provisions and penalties provided for in this Act with respect to all poultry or poultry products handled in the establishment for which such said application for inspection is made.

Approved August 28, 1957.

STATE OF NEW YORK

DEPARTMENT OF AGRICULTURE AND MARKETS

New York State Regulations

WEIGHTS AND MEASURES MANUAL—Circular 834

221.9. METHOD OF SALE OF SPECIFIC COMMODITIES

* * * * *

(c) *Meat, poultry and fish.* Except for immediate consumption on the premises where sold or as one of several elements comprising a ready-to-eat meal sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat food products, poultry (whole or parts) and all seafood except shellfish, offered or exposed for sale or sold, as food shall be offered or exposed for sale and sold by net weight. The meaning of the words meat and meat food products as used in this section is that defined in Section 96-g of the Agriculture and Markets Law.

* * * * *

221.40. MEAT, POULTRY AND FISH. Meat, poultry and fish shall be sold or offered for sale as food at retail by net weight only.

UNITED STATES DEPARTMENT OF AGRICULTURE

AGRICULTURAL MARKETING SERVICE

POULTRY DIVISION

REGULATIONS GOVERNING THE INSPECTION OF POULTRY AND POULTRY PRODUCTS

DEFINITIONS

§ 81.1 *Definitions.* For the purposes of the regulations in this part, unless the context otherwise requires, the following terms shall have the following meanings:

Acceptable. "Acceptable" means suitable for the purpose intended and acceptable to the Administrator.

Act. "Act" means the Poultry Products Inspection Act (71 Stat. 441.).

Administrator. "Administrator" means the Administrator of the Agricultural Marketing Service of the Department or any other officer or employee of the Department to whom there has heretofore been delegated, or to whom there may hereafter be delegated the authority to act in his stead.

Adulterated. "Adulterated" shall apply to poultry and poultry products under one or more of the following circumstances:

(1) If they bear or contain any poisonous or deleterious substance which may render them injurious to health, but, in case the substance is not an added substance, such poultry and poultry products shall not be considered adulterated under this clause if the quantity of such substance in such poultry and poultry products does not ordinarily render then injurious to health.

(2) If they bear or contain any added poisonous or added deleterious substance, unless such substance is permitted in their production or unavoidable under good manufacturing practices as may be determined by the regulations in this part or other provisions of Federal law limiting or tolerating the quantity of such added substance on or in such poultry and poultry products: *Provided,* That any quantity of such added substance exceeding the limits so fixed shall also be deemed to constitute adulteration.

(3) If any substance has been substituted, wholly or in part, therefor.

(4) If damage or inferiority has been concealed in any manner.

(5) If any valuable constituent has been in whole or in part omitted or abstracted therefrom.

(6) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

Applicant. "Applicant" means any person who requests any inspection service.

Commerce. "Commerce" means commerce between any State, Territory, or possession or the District of Columbia, and any place outside thereof; or between points within the same State, or the District of Columbia, but through any place outside thereof; or within the District of Columbia, or between a designated major consuming area and any point outside thereof; or within a designated major consuming area.

Consumer package. "Consumer package" means any container in which a poultry product is enclosed for the purpose of display and sale to household consumers.

Container or package. "Container or package" includes any box, can, tin, cloth, plastic, or any other receptacle, wrapper, or cover.

Department. "Department" means the United States Department of Agriculture.

Dressed poultry. "Dressed poultry" means poultry which has been slaughtered for human food with head, feet, and viscera intact and from which the blood and feathers have been removed.

Dressed poultry identification mark. "Dressed poultry identification mark" means the symbol formulated pursuant to the regulations in this part stating that the dressed poultry is eligible for further processing in official establishments under USDA inspection.

Food product containing poultry product. "Food product containing poultry product" means any article of food for human consumption which is prepared in part from ready-to-cook poultry, but which has been exempted by the Administrator from the category of a poultry food product.

Free from protruding pinfeathers. "Free from protruding pinfeathers" means that the carcass is free from protruding pinfeathers which are visible to an inspector during an examination of the carcass at normal operating speeds. However, a carcass may be considered as being free from protruding pinfeathers if it has a generally clean appearance (especially on the breast), and if not more than an occasional protruding pinfeather is in evidence during a more careful examination of the carcass.

Giblets. "Giblets" means the liver from which the bile sac has been removed, the heart from which the pericardial sac has been removed, and the gizzard from which the lining and contents have been removed: *Provided,* That each such organ has been properly trimmed and washed.

Immediate container. The term "immediate container" includes any consumer package; or any other container in which poultry carcasses or poultry products, not consumer packaged, are packed.

Inspected for wholesomeness. "Inspected for wholesomeness" means, with respect to any poultry product, that it has undergone an inspection and was found at the time of such inspection to be wholesome and not adulterated.

Inspection. "Inspection" means any ante mortem examination of poultry or any post-mortem inspection of dressed poultry at the time of evisceration or any inspection by an inspector to determine in accordance with the regulations in this part (1) the wholesomeness of any poultry product at any stage of the preparation or packaging thereof in the official establishment where inspected for wholesomeness, or (2) the wholesomeness of any previously inspected poultry product if such poultry product has not lost its identity as an inspected product.

Inspection service. "Inspection service" means the official service within the Department having the responsibility for carrying out the provisions of the Poultry Products Inspection Act. Inspection service also means the activities performed, including official reporting, by such official service.

Inspector. "Inspector" means (1) an employee or official of the United States Government, authorized by the Administrator to inspect poultry and poultry products, pursuant to the regulations in this part, or (2) an employee or official of any State government, authorized by the Administrator to inspect poultry and poultry products, pursuant to the regulations in this part, under an agreement entered into between the Agricultural Marketing Service and the appropriate State agency.

Label. "Label" means any written, printed, or graphic material upon the shipping container, if any, or upon the immediate container, including but not limited to an individual consumer package of the poultry product, or accompanying such product.

Official establishment. "Official establishment" means any establishment as determined by the Administrator at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained pursuant to the regulations in this part.

Official identification. "Official identification" means the official inspection mark or the dressed poultry identification mark.

Official inspection mark. "Official inspection mark" means the symbol, formulated pursuant to the regulations in this part, stating that the poultry product was inspected.

Person. "Person" means any individual, partnership, corporation, association, or any other business unit.

Potable water. "Potable water" means water that has been approved by the State health authority or agency or laboratory acceptable to the Administrator as safe for drinking, and suitable for food processing.

Poultry. "Poultry" means any live or slaughtered domesticated bird (chickens, turkeys, ducks, geese or guineas).

Poultry food product. "Poultry food product" means any human food product consisting of any edible part or parts of poultry in combination with other ingredients unless such human food product is exempted by the Administrator.

Poultry product. "Poultry product" means any ready-to-cook poultry or any poultry food product.

Product. "Product" means dressed poultry or poultry product or both.

Ready-to-cook poultry. "Ready-to-cook poultry" means any dressed poultry from which the protruding pinfeathers, vestigial feathers (hair or down as the case may be), head, shanks, crop, oil gland, trachea, esophagus, entrails, reproductive organs and lungs have been removed, and with or without the giblets, is ready to cook without need of further processing. Ready-to-cook poultry also means any cut-up or disjointed portion of poultry or any edible part thereof, as described in this paragraph.

Regulations. "Regulations" means the provisions of this entire part.

Secretary. "Secretary" means the Secretary of the Department, or any other officer or employee of the Department to whom there has heretofore been delegated or to whom there may hereafter be delegated, the authority to act in his stead.

Shipping container. "Shipping container" means any container used or intended for use in packaging the product packed in an immediate container.

Slaughter. "Slaughter" means the act of killing poultry for human food in accordance with good commercial practices in a manner which will result in thorough bleeding of the carcasses.

Unwholesome. "Unwholesome" means:

(1) Unsound, injurious to health, or otherwise rendered unfit for human food.

(2) Consisting in whole or in part of any filthy, putrid, or decomposed substance.

(3) Processed, prepared, packed, or held under unsanitary conditions whereby a poultry carcass or parts thereof or any poultry product may have become contaminated with filth or whereby a poultry product may have been rendered injurious to health.

(4) Produced in whole or in part from poultry which has died otherwise than by slaughter.

(5) Packaged in a container composed of any poisonous or deleterious substance which may render the contents injurious to health.

Wholesome. "Wholesome" means sound, healthful, clean, and otherwise fit for human food.

* * * * *

§ 81.7 *Poultry and poultry products entering or prepared in official establishments.*

All poultry and poultry products processed in an official establishment shall be inspected, handled, prepared, marked and labeled as required by the regulations in this part, and all dressed poultry and poultry products entering an official establishment shall have been inspected and shall be marked as required by the regulations in this part.

* * * * *

LABELING

§ 81.125 *Containers of poultry required to be labeled.* Except as provided in § 81.154 and as may be authorized by the Administrator with respect to shipment of products between official establishments, each shipping container and each immediate container of any product shall at the time it leaves the official establishment bear approved labels containing information in accordance with the provisions set forth in §§ 81.126 to 81.146, inclusive, and the act.

* * * * *

§ 81.127 *Labels to be approved by the Administrator.* No label, except printer's proofs bearing official identification shall be printed until the printer's proof or a photostatic copy has been found by the Administrator to be acceptable; and no label or imprint bearing official identification shall be used until finished copies or samples thereof have been approved by the Administrator, except that approval may be given to printer's final proofs or photostatic copies of labels or samples of stenciled and rubber stamped imprints for shipping containers or containers for institutional packs, and no such labels or imprints shall be used until such proofs or copies have been approved by the Administrator.

* * * * *

§ 81.130 *Wording on labels.* (a) Each label approved for use on an immediate container for poultry products shall bear in distinctly legible form the following information:

(1) The common or usual name of the poultry product.

(2) A statement of ingredients if fabricated from two or more ingredients, including a declaration as to artificial flavors, colors, or preservatives, if any. Such ingredients shall be listed by their common or usual names in the order of their descending proportions. For the purpose of this paragraph, the term "chicken meat," unless modified by an appropriate adjective, is construed to mean deboned white and dark meat; whereas, the term "chicken" may include other edible parts such as skin and fat not in excess of their natural proportions, in addition to the chicken meat. If the term "chicken meat" is listed and the product also contains

skin, giblets, or fat, it is necessary to list each such ingredient. This terminology shall apply to poultry products prepared from other kinds of poultry where applicable.

(3) The net weight or other appropriate measure of the contents, except that the Administrator may approve the use of labels for certain types of immediate containers which do not bear the net weight: *Provided,* That the retailer or distributor supplying the retailer agrees in writing to the Administrator to mark the true net weight on the label prior to display and sale thereof: *And provided further,* That the shipping container bears a statement "Net weight to be marked on consumer packages prior to display and sale": *And provided further,* That the total net weight of the contents of the shipping container shall be marked on such container. The net weight marked on immediate containers of poultry products shall be the net weight of the poultry and shall not include the weights of the wet or dry packaging materials and giblet wrapping materials.

(4) The name and address of the packer or distributor and when the name of the distributor is shown, it shall be qualified by such term as "packed for," "distributed by," or "distributors."

(5) The official inspection mark.

(6) The plant number of the official establishment in which the product was inspected, either within the official inspection mark or clearly visible and in close proximity elsewhere on the exterior of the container, or in the case of canned product, the plant number may be embossed on the lid of each can. In the case of nontransparent consumer packages such as cartons, the plant number may be legibly printed thereon or it may be shown on an insert label placed on top of the product within the package. In the case of transparent wrappers, the plant number may be shown on

an insert label and so placed under the transparent covering that it will be clearly visible and legible.

(b) Each label approved for use on a shipping container shall bear in distinctly legible form the following information:

(1) The official inspection mark.

(2) The plant number of the official establishment in which the product was inspected, either within the official inspection mark, or elsewhere on the container clearly visible and in close proximity to the official inspection mark.

(c) Any label which bears the official inspection mark or any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of the regulations shall not bear any statement that is false or misleading. If the Administrator has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Administrator may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Administrator, he may request a hearing, but the use of the label shall, if the Administrator so directs, be withheld pending hearing and final determination by the Administrator. Any person so denied the approval of any label shall be notified promptly of the reasons for the denial. A written application for a hearing with respect to the denial may be filed by said person with the Administrator within 10 days after notice of the denial. Such petition shall state specifically the errors alleged to have been made by the Administrator in denying approval of the label. After consideration of the facts adduced at the hearing, any determination with respect to the matter by the Administrator

shall be conclusive unless, within 30 days after the receipt of notice of such final determination, the person adversely affected thereby appeals to the United States Court of Appeals for the Circuit in which he has his principal place of business, or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 204 of the Packers and Stockyards Act of 1921, as amended, shall be applicable to appeals taken under this section.

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Office-Supreme Court
FILED
NOV 9 1964
JOHN F. DAVIS, CL

In the

Supreme Court of the United States

No [redacted] 9

SWIFT & COMPANY, INC., and ARMOUR AND COMPANY,
Appellants,

v.

DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,
Appellee.

On Appeal From the United States District Court
for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

No. 571

SWIFT & COMPANY, INC., and ARMOUR AND COMPANY,
Appellants,
v.
DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to Rule 16 of the revised Rules of the Supreme Court of the United States, moves that the final judgment of the District Court be affirmed or in the alternative, that this appeal be dismissed.

Statutes Involved

Section 193 of the Agriculture and Markets Law of the State of New York; The Poultry Products Inspection Act; Regulations 221.40 and 221.9(c) of the Department of Agriculture and Markets of the State of New York; and §§81.125, 81.127, 81.130 of 7 C.F.R. all of which are set forth in Appendix B of appellants' Jurisdictional Statement.

Questions Presented

The only question that the Court below thought warranted consideration is—Does the Supremacy Clause preclude the appellee from enforcing against appellants, interstate packers, a state statute and regulation dealing with "net weight" (Agriculture and Markets Law § 193, Regulation 221.40), which requires that the net weight of the poultry be separately stated from the total weight of the stuffed bird, where appellants have received approval from an administrative officer of the United States Department of Agriculture of a label bearing only the total weight of the stuffed bird? The federal statute (Poultry Products Inspection Act, 21 U.S.C. §§ 451-469, 71 Stat. 441-49), enacted by Congress solely to prevent unadulterated and unwholesome poultry products from being shipped in interstate commerce, requires that "the net weight or other appropriate measure of the contents" be stated (§ 8(a) Labeling).

A procedural question must first be resolved as it appeared doubtful that a three-judge court was properly convened.

Statement of the Case

Appellants, having their plants outside the State of New York, pack and ship frozen stuffed turkeys into this State where they are sold to retailers who, in turn, offer them for sale to the public. These turkeys are labeled by appellants so as to show only the total weight of the entire stuffed bird.

Section 193-3 of the Agriculture and Markets Law of the State of New York provides that "[a]ll food and food products offered for sale at retail * * * shall be sold or offered for sale by net weight. * * *" The only comparable reference in the Federal Poultry Products Inspection Act is found in § 8(a) of said Act which deals with the labeling requirements on products bearing the inspection mark of the United States Department of Agriculture. Included therein is the proviso that the label set forth "the net weight or other appropriate measure of the contents" of the product.

Appellants contend that having received a federally approved label stating the total weight of a stuffed turkey, they are entitled to bar appellee from enforcing against appellants a State regulation which requires in selling stuffed turkeys at retail, *separate statements as to the actual weight of the turkey and the combined weight of stuffed bird.* Since both Federal and State statutes refer to "net weight", the controversy arises over the interpretation of the term "net weight" by the appellee. Appellee's interpretation is based on Governor Rockefeller's message in vetoing legislation that would have permitted the sale of meat and poultry, etc., at retail by total weight rather than net weight. In his veto message dated April 30, 1963 in connection with Assembly Bill, Introductory No. 3782, entitled "AN ACT to amend the agriculture and markets law, in relation to the method of sale of meat, poultry and seafood", he stated:

> "NOT APPROVED
>
> This bill would authorize the sale by total weight rather than net weight of meat, poultry or seafood combined with other food elements, such as stuffing.
>
> At present, sellers are required to list separately the net weight of the meat, poultry or seafood in such combination food products. This bill would thus leave the consumer without knowledge of the separate weight of the major component of the meat, poultry or seafood combination. The consumer should not be deprived of this basic information when purchasing stuffed poultry and other prepared items.

> Disapproval is recommended by the Attorney General, the Mayor of the City of New York and the association of the Bar of the City of New York. In recommending disapproval the Attorney General notes:
>
> > 'The subject bill deprives the consumer of the essential knowledge of what he is buying, and opens wide the door to misrepresentation and deception in the sale of these most vital food items.'
>
> The bill is disapproved."

In carrying out the Governor's intention as expressed in his veto message, the appellee has construed Regulation 221.40 to require that all stuffed poultry sold at retail in New York must have a label affixed, separately stating the net weight of the poultry without stuffing and the total net weight of the stuffed bird. Appellants' argument that the *federal* interpretation of the term "net weight" was based on concern for the wholesomeness of stuffed poultry shipped in interstate commerce was rejected by the lower Court "as wholly contrary to the evidence" (35).*

At the trial, appellee showed that the United States Department of Agriculture had no fixed policy on weight labelling and that in two specific instances it had approved labels which permitted interstate shippers to comply with New York's weight statute and regulation. Appellants' witness, an official of the Poultry Division of the United States Department of Agriculture, admitted that on one occasion his Department had approved labels for stuffed rock cornish game hen which stated the net weight of cornish hen and the total weight with the stuffing (S.M., pp. 171-175). The same witness conceded that the Meat Division of the United States Department of Agriculture had permitted labels giving the net weight of garnished ham and the total weight of the ham (S. M., pp. 192, 193).

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* Figures in parenthesis refer to pages in appellants' Jurisdictional Statement unless otherwise indicated.

Opinion Below

The Court rejected as insubstantial, appellants' contention that appellee's regulation dealing with weights was an impermissive interference with appellants' constitutional right to ship their stuffed turkeys into New York State. Citing *Patapsco Guano Co.* v. *Bd. of Agriculture of North Carolina,* 171 U. S. 345 (1898) and *Savage* v. *Jones,* 225 U. S. 501 (1912), the Court held the State regulation reasonable and not an undue restraint on interstate commerce (25-27). Summarily dismissed as being totally lacking in substance was appellants' claim that the State regulation violated the Fourteenth Amendment (27).

The Supremacy issue was considered at length by the Court and likewise found to be without merit. Judge Friendly after a comprehensive and thorough analysis of the Congressional purpose behind the passage of the federal Poultry Products Inspection Act, concluded that Congress never intended to preempt "the states of their historic undertaking to safeguard their people from improper statements of weight" (34).

The Court below had no problem in deciding that a substantial federal question was not presented by appellants. It was, however, concerned with the question of the propriety of convening a three-judge district court in this case (pp. 40-42).

Argument

This Court's prior decisions confirm the lower court's opinion that there is no merit to appellants' contentions. The lower court properly held that the state's regulation with respect to stuffed poultry sold at retail was not rendered invalid by the Commerce Clause of the Constitution.

Appellants likewise recognize the State's inherent right to regulate weights and measures and concede that (12):

> "The District Court here was correct in concluding that 'the Framers of the Constitution' did not intend

> to divest the states of their historic power to protect the public against false weights and measures or misleading statements about them. Nor is it contended that the Congress, in enacting the Poultry Products Inspection Act, *supra,* intended such a divestment."

Appellants' argument that the federally approved label automatically permits a product bearing such label to enter any state without complying with the state requirements is untenable. In *Plumley* v. *Massachusetts,* 155 U. S. 461, 469 (1894), this Court stated:

> "The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the Constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the States demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country?"

Neither *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, nor *McDermott* v. *Wisconsin,* 228 U. S. 115, cited by appellants, have any application to New York State's regulation dealing with the weight of poultry sold at retail and were distinguished by the Court below. These cases dealt with state statutes that specifically contravened federal statutes. In *Cloverleaf Butter Co.* v. *Patterson, supra,* the federal act supervised the entire process of renovated butter. In *McDermott* v. *Wisconsin, supra,* the state statute was held unconstitutional as it would have required that the federally approved label be removed at the time the package entered the state and prosecution for a violation under the federal statute would be hindered. New York State, however, merely seeks to have a more informative label added to the package to protect its consumers from deceptive practices.

Appellants' argument that the Fourteenth Amendment is an effective bar to the state's weight regulation in that it favors domestic processors of stuffed turkeys, is so specious that the lower court refused to give it any consideration (27). It is obvious that the state's regulation as to weight, applies to *all* processors, domestic or foreign, who sell stuffed turkeys at retail in New York State. Appellants concede at page 16 of their Jurisdictional Statement that the Equal Protection provision of the Fourteenth Amendment has no application where the state statute and regulation apply uniformly.

Appellants' contention that New York State's regulations as to weight, violates the Supremacy Clause of the Constitution, is unfounded. The applicability of the Supremacy Clause to the states in the exercise of their police power has heretofore been clearly defined by this Court. There is no repugnance or conflict between the two acts so that they cannot be reconciled or consistently stand together. *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132 (1963); *Kelly* v. *Washington,* 302 U. S. 1, 10 (1937); *California* v. *Zook,* 336 U. S. 727 (1949); *Huron Portland Cement Co.* v. *Detroit,* 362 U. S. 440 (1960).

In *Florida Avocado* v. *Paul, supra,* this Court considered a state statute which barred the entry into California of Florida avocados that had received approval from federal authorities for interstate shipment pursuant to federal statute and regulations. This Court there held:

1. The state law was not invalid under the Supremacy Clause as both state and federal regulations could be complied with.

2. The subject matter of the state regulation was one traditionally within the scope of the power of the states to prevent deception in the retail marketing of food.

3. The history of the federal act did not disclose a Congressional purpose to displace traditional state powers to regulate the retail sale of food.

4. The Equal Protection clause of the Fourteenth Amendment was not violative because the state law did not discriminate between outside groups and local groups.

Appellants' attempt to differentiate the *Florida Avocado* case is specious (8-10) in view of the specific finding by the lower court from the evidence adduced at the trial, that dual compliance would not be difficult and that Congress in enacting the Poultry Inspection Act was not concerned with the weight of poultry as "[p]assage of the Act did not result from any belief on the part of Congress that there were serious weight or labelling abuses demanding correction; neither the legislative findings nor the declaration of policy make any reference to these subjects. In the entire statute, stretching over nine pages in the Statutes at Large, the sole reference to disclosure of weight consists of one short clause. The House Report, No. 465, 85th Cong., 1st Sess. 1957; 2 U. S. Code Cong. & Adm. News 1957, pp. 1632-33, and the Senate Report, No. 195, 85th Cong., 1st Sess., 1957, say nothing on the subject save for a passing mention of a statement of "the quantity" in paraphrasing the labelling section where this clause appears"(35).

Appellants' further argument that the additional label necessary to conform with New York's weight regulations would not receive federal approval, is premature as appellants have concededly never sought federal approval of a stuffed turkey package containing a supplementary label carrying the additional information required by New York Law and, as Judge Friendly observed, the addition of such a supplementary label would not be unlawful (38).

The opinion below is justly critical of appellants' failure to request a hearing after a federal subordinate official without justification rejected appellants' label (39). Appellants' cavalier attitude toward obtaining federal approval of a label complying with the State's weight regulations (17) comes as no surprise, as it is quite obvious that appellants never intended to comply with New York State's weight regulations and merely went through the motions of submitting labels for federal approval, expecting disapproval.

The lower Court was unsure that this case warranted the convening of a three-judge court pursuant to 28 U.S.C. 2281 (40-42). As a result, the three-judge Court as well as the District Judge acting singly, made identical orders in this matter and an appeal is pending in the United States Court of Appeals pending disposition by this Court.

Appellee originally opposed appellants' motion for a three-judge Court on the ground that the constitutional issues posed by them were lacking in substantiality and that the complaint merely sought to mitigate the affect of appellee's interpretation of a state statute and regulation in its application to appellants' shipment of stuffed turkeys into New York State. Appellants are not seeking to have the state statute declared unconstitutional, only to bar appellee from enforcing against them the state regulation on the basis of the Supremacy Clause. In *Ex parte Bransford,* 310 U. S. 354, 361 (1940), this Court under similar circumstances which would appear to be applicable here, stated that a three-judge court was not required. The Court held:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack

is aimed at an allegedly erroneous administrative action. Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction." (Citing *Stratton* v. *Southwestern Ry.*, 282 U. S. 10, 15)

Conclusion

The District Court correctly determined the issues involved. This appeal presents no substantial constitutional question. The judgment of the United States District Court should be affirmed or the appeal dismissed.

Dated, New York, November 2, 1964.

Respectfully submitted,

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No [redacted] 9

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REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

1. *Action of the Administrator was reasonable.*

On page three of appellee's motion reference is made to Governor Rockefeller's veto message in connection with Assembly Bill Introductory #3782. The point is made that the bill would have permitted the sale of meat, poultry, etc., by total weight rather than net weight. In the interest of clarity it should be pointed out that we are talking at all times about net weight. The issue is not whether the labeling should indicate net weight or some other kind of weight. The issue is to what product or part of the product should the net weight statement refer. The federal action, as evidenced by appellants' labels, calls for a statement of the net weight of the poultry product. It cannot be too strongly emphasized that this is still a statement of *net weight* and does not include the weight of anything other than the food product. What New York requires is two statements of net weight. Again, the bill to which the quoted veto message was addressed would have permitted a single net weight statement on combination foods which contain as one component meat, poultry or seafood. This bill was a verbatim copy of Section 32 of the Model Weights & Measures Law proposed by the National Conference of Weights and Measures. This Conference has as its principal objective the development of uniform statutes and regulations in the weights and measures field among the several states. To this end, it proposes a Model Law and Model Regulations. Operating under the Bureau of Standards of the United States Department of Agriculture, its membership is made up of weights and measures officials from every state in the Union. The Model Law and Regulations which emanate from the National Conference represent the combined views of its members.

The District Court in its opinion questioned the reasonableness of the refusal by the Department of Agriculture to permit multiple weight statements on stuffed turkeys and suggested that, if the question were squarely before it, it would hold this action to be unreasonable. In this connection, it seems that the court was exceeding its permissible function with respect to its review of the administrative action. To strike down such an action, the court would have to find that the Administrator was acting in an arbitrary and capricious manner and that there was no reasonable basis for his decision. It does not matter that the court itself would not make the same decision in the first instance. The court has no right to substitute its judgment for that of the Administrator. In this instance, the act of the Administrator in approving a single weight statement and disapproving a multiple weight statement was not only in accord with Department of Agriculture practice covering a span of 56 years, but also recognized the situation as it exists in 49 of the 50 states. In addition, it was also consonant with the recommended provision in the Model Law promulgated by the National Conference of Weights

& Measures. May the court properly say that the combined thinking of Weights & Measures officials in 49 states is unreasonable? Moreover, may the court properly reach this conclusion when the Director of Weights & Measures of New York State itself has testified that the contrary provision in the New York Law is impractical? (*S.M. 322*) His opinion on this is so strong that he readily admitted that no effort is made to enforce the New York Law with respect to any product other than stuffed turkeys (*S.M. 325-326*).

2. *Uniform labeling requirements for poultry products are essential to the free flow of commerce.*

There can be no argument that the labeling required by New York must be affixed to the product at the plant of manufacture. Since this is so, some sort of uniformity is a legitimate concern of the Department of Agriculture. If the State of New York can properly require additional information, then it must follow that 49 other states can each require such additional information as it considers its legitimate concern. That this is not merely an assertion without foundation is evidenced by the recent case of *Pacific Meat Company, Ltd. vs. Otagaki, 37 LW 2085, Hawaii Sup. Ct. (1964).*

That case involved a requirement by a statute of Hawaii that poultry products bear on their labels a statement indicating whether the poultry was island grown, mainland grown or foreign grown. The Supreme Court of Hawaii considered this statute to be a legitimate exercise of the state's power.

In our modern commercial society it is impossible for a packer to know at the time of processing what will be the ultimate destination of his product. Accordingly, if the states are free to regulate labeling on poultry products, each item prepared must of necessity bear on its label all the information called for by each separate state which chooses to require material supplementary to that which is mandated by the federal act.

Although adding one piece of information to a label might not necessarily be an unlawful burden on interstate commerce, even in the absence of conflict with a federal statute, the necessity of meeting several, perhaps even conflicting, rquirements of different states could very easily become such. In the complex world of food package labeling, uniformity, has become a necessity for the free flow of commerce.

3. *The action of the Administrator in rejecting multiple weight labels reflected the fixed policy of the Department of Agriculture.*

On Page 4 of its motion papers appellee relies upon two instances of deviation as support for its assertion that the United States Department of Agriculture has no fixed policy on weight labeling. It is manifestly unfair to draw this conclusion from the testimony of the government witness. In the first instance, Mr. Hauver testified that the Poultry Division had granted temporary approval on an experimental basis for multiple weight labeling for a stuffed Rock Cornish Game Hen. The operation involved was very small, the stuffing process was performed by hand, and the quantity of stuffing weighed in advance. Even this limited approval had been withdrawn prior to the trial. The incident regarding the garnished ham involved a letter from an otherwise unidentified employee of the meat inspection division indicating that approval would be granted for use in New York City for a label showing separate weights on a garnished ham. There was no evidence introduced that an application for such a label was ever made or approval actually granted. The record does contain a letter from Dr. DeHoll countermanding the impression given by the earlier letter (Plaintiffs' Exh. 9).

Contrary to the conclusion drawn by the appellee, the only fair conclusion to be drawn from the foregoing together with Mr. Hauver's testimony as a whole, is that the Department of Agriculture does indeed have a fixed policy on weight labeling and that that fixed policy is to permit the label to show only the net weight of the poultry product or meat product involved.

4. Plumley vs. Massachusetts *is not in point.*

On Page 6 of its motion appellee relies upon the case of *Plumley vs. Massachusetts, 155 U.S. 461 (1894)*, to support its contention that a product entering New York must comply with the state requirements. That case is inapposite because it was not concerned with any broad regulatory federal statute. The only federal act which was under consideration was a revenue act which in no way can be said to have regulated the sale of the product involved.

CONCLUSION

In light of the foregoing, together with the arguments and authorities, in appellants' Jurisdictional Statement, it is respectfully urged that the motion to dismiss or affirm be denied.

Respectfully submitted,

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Office-Supreme Court, U
FILED
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JOHN F. DAVIS, CLER

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Because of substantial issues of unconstitutionality under the Supremacy Clause, the Commerce Clause and the Fourteenth Amendment, this case was properly heard by a three judge District Court, pursuant to 28 U. S. C. 2281 43

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Opinion Below

The opinion of the United States District Court for the Southern District of New York is reported in 230 F. Supp. 389 (R. 376-395).

Jurisdiction

This suit was brought under 28 U. S. C. 2281 to enjoin the enforcement of Section 193 of the Agriculture and Markets Law of the State of New York and under 28 U. S. C. 2201 for a judgment declaring this section of New York law and the regulation promulgated thereunder to be unconstitutional. The judgment of the District Court was entered on June 12, 1964, amended by Order entered July 17, 1964, and Notice of Appeal was filed in that court on August 10, 1964. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b).

Questions Presented

(1) a. Whether the Poultry Products Inspection Act has pre-empted the field of labeling of poultry and poultry products so as to render unlawful the New York Statute and Regulation requiring additional labeling material on the label of stuffed turkey which is not permitted by the Department of Agriculture.

b. Whether the New York Statute and Regulation requiring the weight of the turkey in addition to the weight of the stuffed turkey are in such direct conflict with the Poultry Products Inspection Act, inasmuch as the Secretary has rejected a label showing any other weight statement except the weight of the stuffed turkey, as to render them unlawful under Article VI, Section 2 of the United States Constitution.

(2) Whether the New York Statute and Regulation, requiring a multiple weight statement on stuffed turkeys which is not permitted by the Secretary of Agriculture under the Poultry Products Inspection Act, unlawfully interferes with and obstructs interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution.

(3) Whether the aforesaid New York Statute and Regulation, in their application, deny to appellants the due process and equal protection of law guaranteed to them by the 14th Amendment of the United States Constitution.

(4) Whether, in view of the substantial issues of unconstitutionality of the New York Statute and Regulation under the Supremacy Clause, the Commerce Clause and the 14th Amendment of the United States Constitution as outlined in questions 1, 2 and 3 above, this case was properly heard by a Three Judge District Court pursuant to 28 U. S. C. 2281 and properly in this Court by direct appeal under 28 U. S. C. 1253.

Statutes Involved

The Poultry Products Inspection Act; Sections 81.1, 81.3, 81.7, 81.125, 81.127, 81.130 of 7 C. F. R. are set forth in Appendix A hereto. Section 193 of the Agriculture and Markets Law of the State of New York; and Regulations 221.40 and 221.9(c) of the State of New York.

Statement of the Case

Appellants pack frozen stuffed turkeys in Minnesota and Wisconsin (R. 48, 90). They ship the turkeys into New York for sale to retailers who resell them to consumers (R. 301, 339). These turkeys are labeled so as to show the total net weight of the poultry product, viz., stuffed turkey, as required by the United States Department of Agriculture (R. 110-112). Section 193 of the Agriculture and Markets Law of the State of New York and regulations issued thereunder require a separate statement of the net weight of the turkey in addition to the net weight of the whole product (R. 43, 265, 271). Pursuant thereto, appellee, Commissioner of Agriculture and Markets of New York, has taken and threatened to take action that has prevented and will prevent the sale of appellants' stuffed turkeys unless they are labeled in compliance with New York Law (R. 257, 295, 206-207, 312).

In mid-1963 both appellants applied to the United States Department of Agriculture for approval of a label which would satisfy the New York requirement (R. 114, 117, 279-283). In accordance with its long-standing policy against multiple weight statements on combination products, the Department of Agriculture denied these applications (R. 117-121). Appellants did not seek administrative or judicial review of these denials (R. 121).

Appellants brought this action in the United States District Court for the Southern District of New York seeking a declaration of their right to sell stuffed turkeys in New York under the federally approved label and an injunction against appellee's enforcing the New York labeling law. The complaint alleges that Section 193 of the New York Agriculture and Markets Law and the action taken and threatened by appellee under it violate appellants' rights under the commerce and supremacy clauses of the United States Constitution and the due process and equal protection clauses of the Fourteenth Amendment. At appellants' request, the action was heard by a Three-Judge Court pursuant to 28 U. S. C. Section 2281.

The District Court dismissed the complaint and entered judgment for the appellee. The Court found no merit in appellants' contention with respect to the commerce clause or the claims under the Fourteenth Amendment. With respect to the Supremacy Clause, the Court found no congressional purpose to preempt the field so as to preclude State action with respect to the labeling of poultry products. The Court further found that there was no irreconcilable conflict between the federal act and the New York Statute so as to render the latter invalid. In this connection, the Court held that appellants could, consistent with the federal law, add a supplementary label to their products which would not bear federal approval. Finally, the District Court questioned whether this was properly a case for a Three-Judge Court, but left the issue open suggesting that appellants prosecute simultaneous appeals to the Supreme Court and to the Court of Appeals for the Second Circuit. Both appeals have been filed and the matter is being held in abeyance in the Court of Appeals pending determination of this issue in the Supreme Court.

Summary of Argument

I.

A. Congress, in enacting the Poultry Products Inspection Act, 71 Stat. 441, 21 U. S. C. 451, has preempted the field with respect to the text of labels on poultry and poultry products moving in interstate commerce. That this was the intent of Congress is evidenced by the broad definition of "label" in the Act which includes all written, printed or graphic material on the container, including the consumer package, and accompanying the product. This intent is further demonstrated by the fact that Congress provided for the prior approval of labels by the Secretary of Agriculture before they may be used on a poultry product subject to the

Act. The comprehensive detailed prescriptions with respect to labels which Congress set out in this Act are inconsistent with concurrent state action in the same area. *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148. Therefore, the holding of the District Court that the federal act did not preclude the addition of supplemental information on the label, other than the mandatory information under the Act, is incorrect. This Court has already interpreted language in the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040, 21 U. S. C. 301, substantially identical to the definition of label in this Act, as applying to any material textually accompanying the product. *Kordel* v. *United States,* 335 U. S. 345; *United States* v. *Urbuteit,* 335 U. S. 355. It follows that the prior approval by the Secretary of Agriculture must include all such written, printed or graphic material, whether included in the mandated information or not. The New York regulations require that the weight statement appear on the principal display panel. Since this must, of necessity, be the portion which will bear the federal inspection legend, it is apparent that this information could not be shown on the label without the Secretary's prior approval. The District Court recognized federal preemption with respect to that part of the label which bears the inspection label. Appellants contend that the federal preemption extends to the entire label, as defined in the Act, but even under the District Court's limited definition of label, the New York requirement would not be permitted.

B. The New York Statute and Regulations requiring multiple weights on stuffed turkeys is invalid because it is in direct conflict with the Polutry Products Inspection Act. *Florida Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132. It is impossible for appellants to comply with both federal and state requirements. Stuffed turkeys labeling as required by New York would not be permitted to be shipped out of appellants' plants in Minnesota and Wisconsin. Stuffed turkeys bearing the federally approved label may not be sold in the State of New York. The additional weight information cannot be ascertained in New York and thus must form a part of the label at the appellants' processing plants. Appellants had a right under the Act to accept the determination of the Secretary of Agriculture when their applications for multiple weight labels on stuffed turkeys were rejected. They were not required to exhaust administrative remedies provided for one who "does not accept" the Secretary's determination, because they did, in fact, accept the ruling. There is no requirement in the law that one must appeal from an administrative determination in order to rely upon it. The Secretary of Agriculture is charged by this statute with the responsibility of seeing that the consumer gets accurate label information. His determinations, as contemplated by Congress, are based upon the expertise and intimate knowledge of the Department of Agriculture of the products and processes of those subject to the Act. The District Court has no warrant or authority in law to substitute its judgment for that of the Secretary, even though the Court might itself have reached a different result in the first instance. *Railroad Commission* v. *Nicholas Oil Co.,* 310 U. S. 573. The Secretary, making his determination that a multiple weight label could be misleading, is entitled to consider factors other than the mere label itself. For example, he may consider the possibility of misleading the consumer if he may buy the same product in different states bearing different labels. He may also consider the potential of misleading the consumer where different products under his jurisdiction show their weights in different ways. He may also consider the impact on the consumer of information disseminated by television or newspapers bearing labels legal in one state and illegal in another. In any event, the Court has no right to make the determination for him. The Secretary had the right to make the determination he made, the appellants had the right to accept that determination, and the result is an irreconcilable conflict between state and federal law which requires that the state law must yield.

II.

The elaborate detail with which Congress has covered the subject of labeling in the Poultry Products Inspection Act, and its repeated reference to the term "consumer package," demonstrates the intention of Congress to exercise its power over commerce in this area to its fullest extent. Therefore, the states may not impose burdens upon or discriminate against interstate commerce in poultry products in conflict with the statute which Congress passed for the regulation of the subject. *McDermott* v. *Wisconsin,* 228 U. S. 115. Not only do the provisions of the Act itself indicate the broad sweep of the Congressional exercise of power, but the legislative history clearly indicates the desire of Congress to provide for informative labeling and to provide that such labeling, subject to the prior approval of the Secretary of Agriculture, should reach the ultimate consumer of the product itself. The judgments of the Department of Agriculture relating to labeling of poultry products are made in a context of intimate knowledge of the formulation of such products and of the processes by which they are manufactured, together with the advantage provided by the daily presence of federal inspectors in the processing plants. The State of New York, on the other hand, with none of this background or expertise, seeks to control the labeling of products manufactured in Minnesota and Wisconsin. In so doing, New York has trespassed on an area already governed under the federal commerce power. The state law should be stricken under these circumstances because its enforcement stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Farmers Ed. & Coop. Union* v. *WDAY*, 360 U. S. 525, 535. To permit each state to impose its will with respect to the labeling of federally inspected products would frustrate the purpose of Congress and wreak havoc on the federal program. Such a disruption of a valid federal regulatory scheme is an improper burden on commerce. The requirement of using different labels for different states, the confusion which would exist with respect to the destination of the separately labeled products, the difficulties of providing for television and newspaper advertising, and the cost and burden of labeling separately for separate states—all constitute an unlawful burden upon and interference with interstate commerce.

III.

A. A label approved by a federal agency pursuant to the provisions of a statute of Congress, exercising its power under the Commerce Clause, confers upon the holder thereof a federal right to ship a product bearing that label anywhere in the United States. *McDermott* v. *Wisconsin*, 228 U. S. 115. New York, by its statute requiring a different label has deprived appellants of that right. Furthermore, the New York statute under consideration, by its terms, applies to all combination foods containing meat, poultry or sea food. However, by admission of the New

York official charged with the enforcement of this statute, New York applies this law only against stuffed poultry. Thus, in his enforcement of the New York law, the appellee denies to the appellants due process of the law because he singles them out, as processors of stuffed poultry, for an arbitrary exercise of the powers of government. *Missouri Pacific Railroad Co.* v. *Mackey,* 127 U. S. 205.

B. For the same reason, appellee also denies to appellants the equal protection of law guaranteed to them under the 14th Amendment of the United States Constitution. While the legislative classification may have been a proper one, classification by the executive under delegation of authority should be consistent with the intent of the legislature. *North American Van Lines, Inc.* v. *United States,* 169 F. Supp. 252, cert. den. 359 U. S. 1011. *A fortiori,* the executive has no power to reclassify in the absence of delegation. The constitutional guarantee of equal protection of the laws should be interposed against discriminations that are entirely arbitrary. *Smith* v. *Cahoon,* 283 U. S. 553. According to the testimony of the Director of Weights and Measures of the State of New York, the only distinction made by appellee between stuffed poultry and the other combination products clearly covered by the New York Statute is that he considers enforcement of the one as impractical and of the other, impossible. However, it appears that the *label* requirement is equally possible with respect to all combination products and, indeed, from a weights and measures standpoint, equally impractical. The enforcement of the law with respect to one item and not to other items included within the same legislative classification is arbitrary and capricious and, therefore, a denial of the equal protection of the law guaranteed to appellants by the 14th Amendment. In addition, in its practical effect, the New York law discriminates against out-of-state processors. In light of the federal requirement for a single weight label, only New York processors of stuffed poultry, doing a completely intrastate business, are in a position to comply with the New York law. Therefore, irrespective of its intent, the New York law operates to discriminate against interstate producers and therefore denies to them, of which class appellants are members, the equal protection of law.

IV.

28 U. S. C. 2281 requires the convening of a Three-Judge Federal Court where the relief sought is an injunction restraining enforcement of a state statute on the ground of unconstitutionality. 28 U. S. C. 1253 provides for the direct appeal from an order of such Three-Judge Court directly to the Supreme Court. The complaint in this action sought such an injunction on the grounds of violation of the Supremacy Clause, the Commerce Clause, and the Due Process and Equal Protection Clauses of the 14th Amendment. The District Court essentially left the question open as to whether it properly had jurisdiction as a Three-Judge Court, applying the case, after hearing, against the yardstick of *Kesler* v. *Department of Public Safety of Utah*, 369 U. S. 153. The rule in *Kesler* appears to be that a Three-Judge Court may properly entertain an action where the sole ground of constitutional challenge is based upon conflict with a federal statute only if that conflict is apparent upon the face of the two statutes without the necessity for further statutory interpretation. However, as noted by the Court below, the Supreme Court in *Kesler* actually indulged in a substantial amount of statutory interpretation of both the federal and state acts involved.

Hence, the question appears to be whether or not more statutory interpretation is required than in *Kesler*. This does not appear to be the case because the New York statute in this action is clear, unambiguous and undisputed as to its meaning, whereas in *Kesler* there was substantial controversy as to the policy of the Utah statute involved. Furthermore, it should be noted that the [illegible] ground of attack in *Kesler* was that of conflict with the federal statute. This is not the case with respect to the present action. This case falls more properly within the rule enunciated in *Florida Lime and Avocado Growers* v. *Jacobsen,* 362 U. S. 73. The burden of the Court's holding in this latter case is that the Three-Judge Court should be convened in any case where an injunction may be granted on the ground of federal unconstitutionality. In that case, the grounds relied upon by the plaintiff were the same as those in the present case. Whether or not a Three-Judge Court should be convened depends upon the averments in the complaint, not upon the determination of the Court after trial. The District Court sought to apply the *Kesler* rule on the ground that, after the hearing, it concluded the other unconstitutional challenges to be insubstantial, although it specifically recognized that they were not such in the pleadings. A careful consideration of the arguments advanced with respect to the Commerce Clause and the 14th Amendment by the appellants in this brief should be enough to sustain the validity of the Court's jurisdiction, even though the Court might conclude that they are not sufficient to sustain appellants' contentions. In any event, it would appear a more proper interpretation of Congressional intent to conclude that the question of jurisdiction of a Three-Judge Court should be determined at the outset rather than at the conclusion of a trial.

ARGUMENT

The New York statute and regulation, in their application, unlawfully invade a field pre-empted by Congress and conflict with a federal statute in violation of Article VI, Section 2 of the United States Constitution.

A. *Pre-emption*

It has long been established that Congress has plenary power over the regulation of commerce between the states under the Commerce Clause of the United States Constitution. The question has given rise to much thorny litigation as to whether or not in a given statute the Congress has chosen to exercise that power in such a way as to "occupy the field" and thus to oust the states from activities which would otherwise by a legitimate exercise of state police powers. Thus, the matter may be one wherein states may not act at all once Congress enters the field. (*Pennsylvania* v. *Nelson,* 350 U. S. 497.) On the other hand, Congressional action may be such as to permit concurrent state action. Whether such action by the states is valid or not will depend upon whether it can exist in harmony with the federal scheme. If it is contrary to or in conflict with the federal statute, the state act must fall. *Campbell* v. *Hussey,* 368 U. S. 297; *Rice* v. *Santa Fe Elevator Corp.,* 331 U. S. 218.

Whether and to what extent Congress has exercised its plenary power over commerce must be determined by a series of alternative tests. First, of course, Congress may use language to indicate its intent that its exercise of jurisdiction in this area shall be exclusive. *Campbell* v. *Hussey, supra.* Second, the nature of the subject matter may be such as to require a uniformity which can only be supplied by the federal authority. *Morgan* v. *Commonwealth of Virginia,* 328 U. S. 373. Third, the subject matter may be such that both federal and state regulations cannot be enforced without impairing the federal superintendence of the field. *McDermott* v. *Wisconsin,* 228 U. S. 115.

The thread of continuity and consistency running through these various tests lies in the concept that the Court is seeking to determine whether Congress has established such a regulatory scheme as would be inconsistent with concurrent state action in the same area. *Morgan* v. *Commonwealth of Virginia, supra. Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148; *Florida Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132.

In enacting the Poultry Products Inspection Act, 71 Stat. 441, 21 U. S. C. 451, Congress devised a broad comprehensive system of inspection and regulation of poultry and poultry products moving in interstate commerce and in major marketing areas. In the preparation of this statute Congress drew heavily upon its experience and the experience of the Department of Agriculture in the Meat Inspection Act, 34 Stat. 1206, 21 U. S. C. 71, and the experience of the Food and Drug Administration in the Food, Drug and Cosmetic Act, 52 Stat. 1040, 21 U. S. C. 301. Thus, the Poultry Products Inspection Act, Section 8, 71 Stat. 444, 21 U. S. C. 457, and the regulations promulgated thereunder (7 C. F. R. 81.127), have adopted the system of prior approval of labels in use under the Meat Inspection Act by the Department of Agriculture for nearly 60 years. The definition of "label" in the Poultry Products Inspection Act combines in one the definitions of "label" and "labeling" found in the Federal Food, Drug and Cosmetic Act (21 U. S. C. 321(k) and (m)). Finally, the

Poultry Products Inspection Act mandates the information which must be contained on a label, both as to shipping container and as to an immediate container, which includes a consumer package. It should be noted that this act provides for compulsory inspection and compulsory labeling.

Thus, it will be seen that Congress, and the Secretary of Agriculture in carrying out its mandate, have devised a very careful, highly detailed and comprehensive scheme of regulation of poultry and poultry products moving in interstate commerce. The labeling provisions of the act are an integral part of this scheme and were seen as necessary to "round out" the system of compulsory inspection (House Report 465, 85th Congress, First Session 1 (1957)).

It is inconceivable that Congress would have made such detailed prescriptions with regard to poultry labels and provided for mandatory prior approval by the Secretary of Agriculture if it had not intended that the labels thus approved were to withstand any modification or supplementation by state action.

Therefore, it is submitted that the Congress has evidenced its intention to occupy the field with respect to the labeling of poultry and poultry products coming under the jurisdiction of the Secretary of Agriculture pursuant to the Poultry Products Inspection Act. If this were not its intent, Congress would not have so carefully provided for prior approval of labels and at the same time adopted the very broad definition of label in the Act. It will be recalled that, in applying the identical language, as it appears in the Food, Drug and Cosmetic Act, this Court has held that "accompanying such product" applies to written matter shipped entirely separately from the product, and even to written matter shipped as long as 18 months after the interstate journey of the product itself. *Kordel* v. *United States,* 335 U. S. 345, and *United States* v. *Urbuteit,* 335 U. S. 355. Since the Secretary of Agriculture is required by the statute to approve in advance all written, printed or graphic material which "accompanies" the poultry product, in this broad sense of that term, it is hard to conceive how Congress could have more completely occupied the field with respect to the labeling of Poultry Products.

The Court below was of the opinion that the Federal Act and the regulations would not preclude the addition of supplemental information on the label so long as it was clear that such information was not a part of the federally approved label. It even suggested that an additional tag or sticker showing the separate weight required by the State of New York could be added without federal approval (230 F. Supp. at 407). Such an argument seems to ignore the plain meaning of the definition of "label" in this Act as well as the judicial history of that language. As noted above, the definition of label is essentially a combination of the definitions of "label" and "labeling" in Sections 201 (k) and (m) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. 321, 52 Stat. 1041. It is a well-established principle of statutory construction that when the Supreme Court has construed particular language in one statute, the subsequent use by Congress of the same language in another statute is conclusive evidence of the intent of Congress that the language thus repeated shall have the meaning ascribed to it by the Court.

Applying this principle, the cases of *Kordel* v. *United States,* 335 U. S. 345, and *United States* v. *Urbuteit,* 335 U. S. 355, are dispositive of the District Court's contention.

Additionally, there is no warrant for the District Court's assumption that 7 C. F. R. Section 81.127 is meant to be limited in its application to that portion of the label which contains the mandated information or the inspection mark. This regulation, prohibiting the printing of a label prior to its approval by the Secretary, does not limit or modify the meaning of "label" as defined in the Act. That the Secretary does not recognize any such limitation is clear from the testimony of Mr. Hauver, Deputy Director of the Poultry Division of the United States Department of Agriculture.

Further, in this connection, the Court below suggested without any apparent basis in the record therefor, that New York would be satisfied if the added information appeared anywhere on the label. However, the attention of this Court is called to Section 221.7 of Title I of the Official Compilation of Codes, Rules and Regulations of the State of New York, which reads as follows:

> "221.7 PROMINENCE AND PLACEMENT. All information required by this Part to appear on a container shall be prominent, definite and plain and shall be conspicuous as to size and style of letters and numbers and as to color of letters and numbers in contrast to color of background. The declaration of identity, if required *and the net quantity statement shall appear on the principal display panel.* The name and address of the manufacturer, packer or distributor shall appear either on the principal display panel or on any other appropriate panel. Any required information that is either in hand lettering or hand script shall be en-

> tirely clear and equal to printing in legibility." (Emphasis supplied.)

Accordingly, by the very regulation of the State of New York itself, it would be impossible for appellants to add a separate statement of the weight of the turkey anywhere but on the principal federally approved label itself. Under these circumstances, it is fair to assume that even the District Court would agree that this statement would be subject to the prior approval of the Secretary of Agriculture. Indeed, the District Court conceded, at least by implication, that Congress has pre-empted the field with respect to the text of the federally approved label. Agreeing that the Secretary is empowered to construe "net weight" as referring to the weight of the stuffed turkey, the Court said:

> "this alone would not outlaw further statements concerning weight so long as these do not obscure or detract from the force of the federally approved label, and so long as they are not presented so as to imply federal approval." 230 F. Supp. 398, 408.

Since New York by regulation, requires its weight statement to appear on the principal display panel, it is impossible for its additional weight requirements to be stated without implying federal approval.

It is submitted that Congress has occupied the field with respect to the text of the label on poultry products coming within the purview of the Poultry Products Inspection Act. Therefore, New York is precluded from imposing additional requirements in this area. Even under the District Court's limited interpretation of "label," the New York law improperly invades an area staked out by Congress as exclusively federal.

B. *Conflict*

It is well established that where a state statute conflicts with an Act of Congress, the state statute must yield. Conflicts may be subtle and require an elegant argument to develop. However, no sophisticated rhetoric is needed where a person engaged in interstate commerce cannot comply with both requirements simultaneously. As this Court recently stated, in *Florida Avocado Growers, Inc.* v. *Paul*:

> "A holding of Federal exclusion of State law is inescapable and requires no inquiry into congressional design where compliance with both Federal and State regulations is a physical impossibility for one engaged in interstate commerce, cf. *Union Bridge Co.* v. *United States*, 204 U. S. 364, 399-401, 51 L. ed. 523, 539, 27 S. Ct. 367; *Morgan* v. *Virginia*, 328 U. S. 373, 90 L. ed. 1317, 66 S. Ct. 1050, 165 ALR 574; *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520, 3 L. ed. 2d 1003, 79 S. Ct. 962. That would be the situation here if, for example, the Federal orders forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the state any avocado measuring less than 8% oil content. No such impossibility of dual compliance is presented on this record, however." (373 U. S. 132, 142-143.)

The situation in the case at bar falls precisely within the language of Mr. Justice Brennan, just quoted. It is physically impossible for appellants to comply within both the federal and the New York State requirements. As testified by Mr. Hauver, Deputy Director of the Poultry Division of the United States Department of Agriculture, dual weights which New York demands would not be allowed out of appellants' plants in Wisconsin and Minnesota (R. 111). Conversely, appellants' stuffed turkeys bearing the label approved by the Department of Agriculture are barred from sale in the State of New York. As has been seen, there is no way that appellants can attach, affix or supply the additional information which New York requires without obtaining the prior approval therefor from the Secretary of Agriculture. No matter how that information may be disseminated, it will still be "accompanying such product" within the meaning of "label" as defined in the Poultry Products Inspection Act. Because of the nature of the product, the only place where this information is available is at the processing plant. Thus, there is no physical possibility of affixing the separate weights of the turkey, in New York or elsewhere, without having that weight statement on a part of the label and subject to the prior approval of the Secretary of Agriculture.

The Secretary has approved labels for appellants' stuffed turkeys bearing a single net weight for the complete "poultry product" in accordance with the terms of the federal act and regulations. He has withheld approval of labels submitted by appellants which would have borne separate weights. The Court below recognized the conflict but considered that it was not an irreconcilable one. The basic thrust of the District Court's holding in this regard is that the clash between federal and state action is not inevitable in this circumstance because the Secretary *could have decided otherwise!* The very simplicity of this device is disarming and, if permitted to go unchallenged, could provide an easy solution for many conflict problems. However, it overlooks the fact that the discretion reposing in the Secretary to approve labels on poultry products is a legitimate and integral part of the congressional scheme for the regulation of commerce in poultry. Conceivably, Congress could have prescribed in detail the entire label of every poultry product. However, in order to establish a more practical solution, it chose to delegate to the Secretary, acting through his expert subordinates, the function of reviewing and approving labels within the framework of the standards set up in the Act. That fact does not render the Secretary's action any less a part of the federal scheme than if it had been performed by Congress itself.

In its opinion, the District Court was concerned that the action taken here in rejecting appellants' multiple weight labels was that of a "subordinate federal official." However, it is clear from Section 8(b) of the Act that the action of this "subordinate federal official" was the act of the Secretary himself. This section provides in part:

> "If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading." (71 Stat. 444, 21 U. S. C. 457(b).)

Acting on and within the authority conferred by the statute, the Secretary has, by regulation (7 C. F. R. 81.3), delegated this responsibility to the Administrator, and the Administrator has again properly delegated this responsibility to the Poultry Division. These delegations, however, do not make the action taken on appellants' labels, any less the action of the Secretary of Agriculture.

Surely, Congress, in 1957, did not expect the Secretary of Agriculture to review and approve or disapprove all poultry labels personally. Neither did it expect that the Administrator of the Agricultural Marketing Service would perform this task personally. Nevertheless, Congress deliberately chose to use the quoted language and must, therefore, have intended that the action of the Department of Agriculture taken with respect to a proposed label would be the action of the Secretary. Thus, when it provided for an administrative hearing at the request of one who does not accept the Secretary's determination, it did not imply a review by superior over subordinate, but rather provided an opportunity for the applicant to have a full hearing of his proposal and the reasons for its rejection.

The District Court was of the opinion that appellants had an obligation to seek administrative review of the rejection of their multiple weight labels. It read the statute as though it said "anyone aggrieved" by the Secretary's determination (230 F. Supp. 398, 409). This is standard and common language. It should be noted, however, that Congress did not use this language in the statute. Rather, it resorted to the rather unusual phraseology found immediately following the language quoted above: "If the person using or proposing to use the label *does not accept* the determination of the Secretary, he may request a hearing." (Emphasis supplied.) It should not lightly be assumed that Congress intended to use the terms "aggrieved" and "does not accept" interchangeably. If Congress meant to say "aggrieved" it knew how to say it. But by its failure to do, it is appropriate to conclude that Congress intended the language used to have a different import.

Indeed, that this is so is clearly demonstrated in the very next sentence where the Act provides "any such determination by the Secretary shall be conclusive unless within 30 days after the receipt of notice of such final determination the person *adversely affected* thereby appeals to the United States Court of Appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit." (Emphasis supplied.) Surely, it must be concluded that Congress intended these different words to have a different import.

The Administrative Procedure Act, 5 U. S. C. 1009(a), provides as follows:

> "Any person suffering a legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."

Again in the Federal Food, Drug and Cosmetic Act, the Congress twice used the term "adversely affected." 21 U. S. C. 371(f), 376(C)(i).

The inescapable conclusion from this deliberate choice of language by Congress is that the Congress intended that the acceptance by the applicant of the Secretary's determination should be final and binding for all purposes.

Appellants here did, in fact, accept the determination of the Secretary. As Mr. Hauver testified (R. 113), the determination of the Secretary was made against a background of intimate knowledge of the product, its formulation, the processes of its manufacture, and with due regard to the inspection procedures and facilities of the Department. Plaintiffs' Exhibit 5 shows the scope of the information which the Secretary requires in connection with a proposed label (R. 112, 272-278). Both Swift and Armour have been subject to the jurisdiction of the Department of Agriculture under the Meat Inspection Act since its enactment in ~~1957~~ 1907. Against that background of experience with the expertise and the intimate knowledge of their products and processes possessed by the Department of Agriculture, both had a right to recognize the validity and soundness of the Secretary's reasons advanced in connection with the rejection of their proposed labels. They had a right to accept his determination in the light of these factors, and they did so. This may be the very reason why Congress used the language "does not accept" rather than "aggrieved."

It has long been an accepted rule of administrative law that one will not be heard to complain in the courts of administrative action or adjudication unless he has first exhausted his administrative remedies. *Myers* v. *Bethlehem Ship Building Corp.,* 303 U. S. 41; *Levers* v. *Anderson,* 326 U. S. 219. Citations to sustain this proposition could be proliferated almost endlessly. However, none has been found to sustain the proposition that he also must pursue administrative and judicial procedures if he would seek *to rely upon* an administrative determination. Other than the opinion in the Court below, no authority has been discovered which would require a party to appeal from a determination with which he agreed, even though technically it was contrary to his petition. In the instant case, the labels which were approved for appellants' stuffed turkeys are acceptable everywhere in the country except in the State of New York. When the Administrator withheld approval of appellants' application for labels showing multiple weight statements as required by New York law, appellants realized that the position taken by the Department of Agriculture was consistent, not only with its position on the hundreds of other poultry combination products, but also with its position with respect to its nearly 60 year administration of the Meat Inspection Act, 34 Stat. 1260, 21 U. S. C. 71. The law does not require that appellants expend months, maybe years of time and substantial sums of money to prove that the Administrator was right in order to perfect their standing to challenge the one state enactment which is contrary to the Federal position.

Appellants herein are not attacking the administrative determination of the Department of Agriculture. The attack was launched by the appellee and apparently furthered by the District Court. However, in so doing, the District Court seems to have overlooked an equally salutary principle. The Court should not substitute its judgment for that of the Administrator even though the Court might itself have reached a different result in the first instance. *Railroad Commission* v. *Nichols Oil Company,* 310 U. S. 573; *Panama Canal Company* v. *Grace Lines, Incorporated,* 356 U. S. 309. The Administrator, with his knowledge of all facets of the industry, and his concern with the hundreds of products which might be affected by his determination, is in a much better position to determine the appropriateness of label information than is the District Court, whose experience is largely limited to one case and one product.

The District Court was of the view that the hearing contemplated by the federal statute would be a full-blown public hearing, as to which New York must be given a notice and an opportunity to be heard. It is not at all clear that this was the intent of Congress. However, assuming that New York would be entitled to a notice and an opportunity to be heard in such a hearing, would not the same be true of the other 49 states which permit the use of the single weight label? For aught that appears, any or all of the other 49 states may have as strong a policy in favor of single weight labeling as New York has for multiple weights. And, indeed, by the same reasoning, would not all the other producers of stuffed turkeys and the over 100 other combination poultry products be entitled to participate as well? In advance of such hearing, with the participation of any or all states and poultry processors who might be interested in the result, can any court properly say, as the District Court so blandly did here, that no one "could reasonably find that a separate statement of the weight of the stuffed bird would be false or misleading"? 230 F. Supp. 398, 409. Considering the mobility of today's population, would not the Secretary have the right to conclude that different methods of showing weight on the same product in adjoining states could be misleading? Could not the Secretary properly conclude that different methods of showing weight on different combination poultry products could be misleading to the consumer? The District Court not only undertook to substitute its judgment for the expert determination of the Secretary, but also compounded its error by prejudging in advance his determination after a hearing.

Mention was made at the trial and in the lower court's opinion of the fact that the additional weighings of appellants' turkeys in order to mark them in accordance with New York's requirements would consume no more than 30 seconds of time. Apparently, no thought was given to the fact that, if New York can impose its additional requirements, so too can the other 49 states. It was blithely assumed that a label satisfactory to New York, would, *ipso facto,* be acceptable to all other states. There is no warrant in the record for this assumption. The 30 second time loss was based upon the idea that appellants would label all their stuffed turkeys with multiple weights just as they now label all their stuffed turkeys with single weights. However, as indicated, this might not be satisfactory to all the other states. There could well be additional requirements imposed by other states if this Court concludes, as did the District Court, that federal law does not preclude additional matter not subject to federal approval. See, for example, *Pacific Meat Co.* v. *Otagaski,* 394 P. 2d 618 (Hawaii, 1964).

Indeed, there is testimony in the record (R. 245-6) to indicate that the possibility of conflicting regulations was not confined to the 50 states. The City of New York has its own requirement which appears to be different from that of the State of New York and, presumably, this situation could be proliferated throughout the cities of the United States.

Our courts should not close their eyes to the realities of modern commercial life. In this era of automation and assembly line techniques, it is not economically feasible for interstate food processors to label their products separately for separate states. Any attempt to do so would immediately multiply the simple 30 second time loss many fold. It would also inevitably result in the innocent but erroneous shipment of products into the wrong states. In addition to this, one must consider the impact of conflicting regulations in neighboring states and communities upon the television advertising of appellants' products. It would be impossible for appellants to televise products showing the proper label when consumers living in jurisdictions having different label regulations view a program transmitted from a single station. These are further reasons why the Secretary might conclude that the multiple weight label could be misleading.

And there are more. John Madden, Director of Weights and Measures of the State of New York, the official in charge of enforcement of the law here under attack, testified very candidly that the law was impractical from the standpoint of enforcement with respect to stuffed turkeys, and virtually impossible of enforcement with respect to other meat, poultry and sea-food combinations. Mr. Hauver of the Department of Agriculture testified to the Department's concern because of the impossibility of verifying the accuracy of the weight statement after thawing the turkey. The District Court thought this concern was more properly New York's. Yet it is clear from the statute and the regulations that the Secretary of Agriculture is charged with the responsibility of seeing that the consumer gets accurate label information. The District Court noted that "apparently New York had decided that a statement whose policing may require reasonable tolerance is better than none." The Court's use of the word "apparently" is well advised, because there is nothing in this record to indicate that New York permits any tolerance, official or unofficial. Again, is it inconceivable that the Secretary, faced with the harmonious testimony of his own people and the New York officials as to the impracticability and unenforcibility of multiple weight labels, would conclude that such labeling might be false or misleading?

In sum, then, the easy reconcilability of the state and federal requirements which the District Court found is based upon a series of assumptions without warrant in the record and an erroneous arrogation to itself of authority which Congress has specifically allocated to the Secretary of Agriculture. The conflict between the two authorities is direct, real and irreconcilable. Appellants cannot comply with one without running afoul of the other. If they label their turkeys in accordance with federal requirements they are barred from sale in the State of New York. If they label their turkeys in accordance with New York requirements, federal authorities will not permit them to be shipped out of the appellants' plants. Clearer conflict cannot be imagined. Neither can there be conjured up a more direct obstruction of interstate commerce or a more complete frustration of Congressional purpose.

It is submitted that the New York statute and regulation violate the Supremacy Clause of the United States Constitution (Article VI, Section 2) because they seek to regulate the labeling of poultry moving in commerce, an area which has been pre-empted by Congress in the Poultry Products Inspection Act, and because they are in irreconcilable conflict with the labeling provisions of that Act.

The New York statute and regulation, in their application, unlawfully interfere with and obstruct interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution.

The wisdom of the Founding Fathers in forging a political entity sufficiently flexible to provide effective government not only for their own relatively uncomplicated agrarian society but also for the complex industrial society of the twentieth century is manifest in the simple phraseology of Article I, Section 8, Clause 3 of the Constitution they created whereby the Congress was given power

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

In the absence of federal legislation "(t)he Commerce Clause effects, by its own force, an apportionment of the power to regulate interstate commerce, taking from the states the power to enact laws which unduly burden commerce . . . " *Allan B. Dumont Laboratories* v. *Carroll*, 86 F. Supp. 813, 814 (E. D. Pa. 1949), aff'd 184 F. 2d 153 (3d Cir. 1950), cert. denied, 340 U. S. 929. However, where Congress has exercised its power over a subject within its constitutional reach, a state "may not, under the guise of its police power or otherwise impose burdens upon or discriminate against interstate commerce nor may it enact legislation in conflict with the statutes of Congress passed for the regulation of the subject . . . " *McDermott* v. *Wisconsin*, 228 U. S. 115, 132.

In its opinion, the District Court in this case rejected the contention of plaintiffs, who are appellants in the Supreme Court, that the New York Statute and Regulation as applied were invalid because of their interference with interstate commerce. The Court noted:

> "that the framers of the Constitution did not intend that the laws of such ancient vintage in New York and other states must yield to an *unexercised* national authority in the case of goods coming from outside the states is obvious from the mere statement". 230 F. Supp. at 402. (Emphasis supplied.)

As will be demonstrated below, the national authority referred to by the District Court has, indeed, been thoroughly exercised. However, the point made here is that appellants do not contend that either the federal Constitution or the scheme of regulation of poultry products expressed in the Poultry Products Inspection Act, 71 Stat. 441, 21 U. S. C. 451, *et seq.* and the Regulations issued thereunder, 7 C. F. R. 81.1, *et seq.*, divests the state of all its authority over net weights. Appellants do assert that the federal law precludes the state from acting with respect to the *text* of a label on consumer packages of poultry products shipped in interstate commerce, although the state retains its authority to protect the public against false weights or measures.

> "It has long been recognized that in those fields where uniformity is not essential either the state or federal government may act. (Citing cases.) Where this power exists, it often happens that there is a partial exercise of that power by the federal government. In such cases, the state may legislate freely upon those phases of the commerce which are left unregulated by the nation." *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 155-6.

Appellant's contention that New York has no power to prescribe textual material for the labels of federally inspected poultry products flows from the broad scope of the Poultry Products Inspection Act, *supra,* and the regulations issued thereunder. The statute defines as a label

> "Any written, printed or graphic material upon the shipping container, if any, or upon the immediate container, *including but not limited to an individual consumer* package . . ." (21 U. S. C. 453(n).) (Emphasis supplied.)

The term "immediate package" is defined to include "any consumer package," 21 U. S. C. 453(p); the immediate container of a poultry product is required to bear the official inspection mark, the name of the product, its ingredients, the net weight, the name and address of the producer and the official number of the processing plant, 21 U. S. C. 457(a); the channels of interstate commerce are barred to poultry products whose immediate containers are not marked in accordance with federal law, 21 U. S. C. 458(a). The repeated references in the statute to the term "consumer package" demonstrates beyond cavil the intention of Congress to exercise its power over commerce to its fullest extent. And, as the Supreme Court held in *United States* v. *Sullivan,* 332 U. S. 689, that power extends

> "to every article that had gone through interstate commerce *until it finally reached the ultimate consumer,*" 332 U. S. at 697. (Emphasis supplied.)

Most pertinent, Section 8(b) of the statute, 21 U. S. C. 457(b), provides, in part, the following:

> "If the Secretary has reason to believe that any label in use or *prepared for use* is false or misleading in any particular, he may direct that the use of the label be withheld until it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading." (Emphasis supplied.)

The Secretary cannot be in a position to judge whether a label "prepared for use" is false or misleading unless he has the opportunity to review that label prior to its use. To provide that opportunity, the Secretary has issued Regulations, reference to which is made below. When one views the statutory language, it is somewhat difficult to understand the District Court's reference to "an unexercised national authority," see 230 F. Supp. at 402.

As noted above, the Regulations promulgated by the Secretary of Agriculture pursuant to the authority vested in him by Section 814 of the Poultry Products Inspection Act, 21 U. S. C. 463, contain more details with respect to labels and labeling of poultry products. By failing to make any challenge to the validity of the Regulations in the trial court, Appellee is precluded from attacking them in the Supreme Court. *Beck* v. *Washington,* 369 U. S. 541, 554; *DeSylva* v. *Ballentine,* 351 U. S. 570, 582. The Regulations repeat the statutory definition of "label" and "immediate container," 7 C. F. R. 81.1; mandate approval by the Secretary's designated agent prior to use of a printed label, 7 C. F. R. 81.127; and prescribe the wording on labels, 7 C. F. R. 81.130.

While it is true that the Legislative Finding incorporated in Section 2 of the Poultry Products Inspection Act, 21 U. S. C. 451 refers to the injury to the public caused by the movement in interstate commerce of "unwholesome and adulterated poultry products" and that the Declaration of Policy found in Section 3 of the Act, 21 U. S. C. 452, calls for

> "the inspection of poultry and poultry products . . . to prevent the movement in interstate or foreign commerce . . . of poultry and poultry products which are unwholesome, adulterated or otherwise unfit for food."

the further provisions of the statute clearly demonstrate that regulation of labeling was deemed an integral part of the inspection system mandated by Congress. Indeed, the House Committee on Agriculture, reporting on the bill which, in substance, became the Poultry Products Inspection Act, stated:

> "The purpose of this bill is to establish a system of compulsory inspection by the Federal Government of poultry and poultry products in interstate commerce

> and in major intrastate consuming areas of such size and consequence as to necessarily effect (sic) interstate commerce. Such inspection would be rounded out by requirements as to the maintenance of sanitary facilities and practices and *as to correct and informative labeling of products.*" H. R. Rep. No. 465, 85th Cong., 1st Sess. 1 (1957). (Emphasis supplied.)

As a further insight into the reach of the legislation with respect to labeling, the following colloquy between Congressman John C. Watts, Chairman of the Subcommittee on Poultry and Eggs of the House Agriculture Committee and Hermon I. Miller, Director of Poultry Division of the Department of Agriculture is cited:

> "Mr. Miller: . . . Section 7 is the section on labeling. And we are proposing, as I indicated, a little change here.
>
> "This would require that the shipping container be labeled with the inspection mark affixed and the number of the official establishment.
>
> "It would require that the immediate container, that is the consumer package, contain additional information, which we could read here, if necessary, but it is information that is required in the labeling section of the Food, Drug and Cosmetic Act, etc.
>
> "The contents, the weight, if made up of more than one product, the constituents that are contained in it and so on and so forth . . .
>
> "Mr. Watts: . . . As I understand it, you will make the package the housewife buys, delivered to the house, it will contain the identifying information rather than

> put it on the outside of the container in which it is shipped.
>
> "Mr. Miller: That is right." Hearing Before the Subcommittee on Poultry and Eggs of the House Committee on Agriculture, 85th Cong., 1st Sess., Ser. G at 29 (1957).

In the light of the unequivocal language of the statute in question, supported by its legislative history, to the effect that the federal authorities were given jurisdiction over labeling of poultry products, and the decision of the Secretary of Agriculture, as manifested in the Regulations he issued, to exercise his statutory authority by requiring approval of any such labeling by the Secretary or his designated agent prior to use, we come to the question of the power of the state to demand more than that prescribed by the federal government. As noted above, the Department of Agriculture was given jurisdiction over labeling of poultry products as an integral part of a comprehensive inspection system. At the trial of this action, the Deputy Director of the Poultry Division of the Agricultural Marketing Service, testifying for plaintiffs, stated:

> "We approve these labels for products, and we also review at the same time when this consideration is made the processing procedure, the amounts, the variations, the ranges in the amount of stuffing and we also have inspectors stationed in plants to check on these formulated items to satisfy themselves that the product is packaged in compliance with the approved formula." (R. 127-8.)

The judgments of the Department of Agriculture relating to labeling of poultry products are made, then, in a context of intimate knowledge of the formulation of such products and of the process by which they are manufactured together with the advantage provided by the daily presence of federal inspectors in the processing plant. The State of New York, on the other hand, with no ostensible expertise on these matters, reaches a conclusion on a labeling matter contrary to that of the Department of Agriculture and endeavors to control labeling of products manufactured in Wisconsin (R. 91) and Minnesota (R. 339). Appellants argue that New York, in imposing its will with respect to labeling of these poultry products, has trespassed upon an area already governed under the federal commerce power depriving appellants of their right to make their goods available under a federally approved label to consumers throughout the nation. A state is not permitted

> "to discredit and hinder legitimate Federal regulations of interstate commerce, to destroy rights arising out of the Federal statute which have accrued both to the government and the shippers and to impair the effect of a Federal law which has been enacted under the Constitutional power of Congress over the subject." *McDermott* v. *Wisconsin,* 228 U. S. 115, 133-4.

The District Court remarks that

> "(t)here could hardly be a fitter subject for state inspection than weights." 330 F. Supp. at 402.

But, astonishingly, the Record shows the inadequacy of the State of New York to "inspect" appellants' stuffed turkeys. The Director of Weights and Measures of the New York Department of Agriculture and Markets, testifying for defendant, admitted that the present law of New York relating to stuffed turkeys was not practical from the standpoint of Weights and Measures (R. 232-3). Moreover, according to the same witness, it is "impossible" to check the weight of the ingredients of such combination foods as "TV dinners, ravioli, hash, pork and beans" and, despite the unquestioned application of Section 193 of the New York Agriculture and Markets Law and Regulation 221.9(c) to such products, the state's Director of Weights and Measures makes no requirement that they bear separate statements of meat and non-meat content (R. 234). These facts bear out the practical wisdom of the legislative scheme which entrusts to the Department of Agriculture plenary jurisdiction over labeling of poultry products subject to its supervision. The Supreme Court has not hesitated to

> "abrogate state law where satisfied that its enforcement would stand 'as an obstacle to the accomplishment and the execution of the full purposes and objectives of Congress.'" *Farmers Ed. and Coop. Union* v. *WDAY*, 360 U. S. 525, 535; *Bethlehem Steel Co.* v. *New York Labor Relations Board*, 330 U. S. 767, 773.

To permit each state of the union to impose its will with respect to the labeling of federally inspected and approved products would frustrate the purpose of Congress and wreak havoc on the federal program, which places responsibility for inspection of the product and concomitant approval of its labeling in the same administrative body. Such a disruption of a valid federal regulatory scheme is itself an improper burden on interstate commerce, and, when it is coupled with the chaos liable to occur from the use by processors of varying labels to satisfy the demands of different states, the added cost of preparing poultry products resulting from the need for multiple labeling and the confusion to consumers likely to flow from the use, in various parts of the nation, of different labels, clearly constitutes interference with the free flow of commerce among the states which the Constitution of the United States aims to foster.

The New York statute and regulations, in their application, deny to appellants due process and the equal protection of law guaranteed to them by the Fourteenth Amendment of the United States Constitution.

A. *Due Process:*

Property is more than the mere thing which a person owns; it includes the right to acquire, use and dispose of it; and the Constitution, in the Fourteenth Amendment, protects these essential attributes. *Buchanan* v. *Warley,* 245 U. S. 60; *Terrace* v. *Thompson,* 263 U. S. 197; *Louis K. Liggett Co.* v. *Baldridge,* 278 U. S. 105. Valid contracts are property. *Lynch* v. *United States,* 292 U. S. 571.

A label approved by a federal agency pursuant to the provisions of a statute of Congress, exercising its power under the Commerce Clause, confers upon the holder thereof a federal right to ship a product bearing that label anywhere in the United States. In *McDermott* v. *State of Wisconsin,* 228 U. S. 115, the Supreme Court while studying a Wisconsin labeling requirement which was interpreted to forbid the sale of corn syrup bearing a federally approved label said:

> "Conceding to the state the authority to make regulations consistent with the Federal Law for the further protection of its citizens against impure and misbranded food and drugs, we think to permit such regulation as is embodied in this statute is to permit a state

> to discredit and burden legitimate Federal regulations of interstate commerce, to *destroy rights arising out of the Federal Statute* which have accrued both to the government and the shipper, and to impair the effect of a Federal law * * * " (228 U. S. at 133-4). (Emphasis added.)

See also *Quaker Oats Company* v. *City of New York,* 295 N. Y. 527, affirmed sub nom. *Hill Packing Company* v. *City of New York,* 331 U. S. 787; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148.

Federal law and Federal policy not only approve a single weight statement on a stuffed turkey label, but reject approval for a multiple weight statement on such a label. Therefore, the necessary result of the New York statute is that the only stuffed turkeys which may be sold in the State of New York are those produced therein. No stuffed turkey labeled in accordance with the New York requirements may be shipped in interstate commerce. Thus, whatever may have been its purpose, the inevitable effect of the New York law is to discriminate against interstate commerce.

The phrase due process of law "formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of the facts involved in the given case." *Betts* v. *Brady,* 316 U. S. 455, 462. It is a concept of fundamental justice, and it is not satisfied by mere formal correctness. *Foster* v. *Illinois,* 332 U. S. 134. It requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice. *Buchalter* v. *New York,* 319 U. S. 427; *Hebert* v. *Louisiana,* 272 U. S. 312. It is secured if the laws operate on all alike, and does not subject the individual to an arbitrary exercise of the powers of government. *Missouri P. R. Co.* v. *Mackey,* 127 U. S. 205; *Minneapolis & St. L. R. Co.* v. *Herrick,* 127 U. S. 210; *Leeper* v. *Texas,* 139 U. S. 462; *Giozza* v. *Tiernan,* 148 U. S. 657; *Duncan* v. *Missouri,* 152 U. S. 377.

The Legislature of the State of New York in Section 193 of the Agriculture and Markets Law has sought to regulate the labeling of meat, poultry and seafood combinations. The Commissioner of Agriculture and Markets of that state by Regulation 221.9(c) has purported to do likewise. However, according to the testimony of Mr. Madden, who stands in the shoes of the Commissioner, the latter in fact carries out the Legislature's mandate and his own only against stuffed turkeys. Thus, the Commissioner seeks to function behind a facade of formal correctness. However, it is clear merely by a statement of the facts that the action of New York State through its Department of Agriculture and Markets is not consistent with the fundamental principles of liberty and justice. Furthermore, due process was not herein secured because the law of New York does not operate on all alike, even though by its terms it purports to do so. Rather, it subjects the individual, the processor of stuffed turkeys, to an arbitrary exercise of the powers of government.

B. *Equal Protection:*

The prohibition of this amendment extends to all action of the state denying equal protection of the laws, whether it be action by the legislative, executive or judicial branch of the state government; it includes the actions of any agency of a state and the officers or agents by whom its powers are asserted. *Tribune Review Pub. Co.* v. *Thomas,* 120 F. Supp. 362 (W. D. Pa. 1954).

Where a state is dealing with its domestic concerns and not trenching upon prerogatives of national government, a state's legislative power to classify is extremely broad and limited only by constitutional rights and by the doctrine that a scheme may not be palpably arbitrary. *Phillips Chemical Co.* v. *Dumas Independent School Dist.,* 361 U. S. 376, rehearing denied, 362 U. S. 937.

While legislative classification need only withstand the test of constitutionality, classification by the executive under delegated authority should be consistent with the intent of the legislature. *North American Van Lines, Inc.* v. *United States,* 169 F. Supp. 252, certiorari denied, 359 U. S. 1011. Such classification made in the exercise of police power must be based on some real and substantial difference which bears a reasonable and just relation to the object of the legislation, and the constitutional guaranty of equal protection of the laws will be interposed against discriminations that are entirely arbitrary. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389; *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490; *Smith* v. *Cahoon,* 283 U. S. 553.

Mr. Madden, Director of Weights and Measures of the State of New York, confesses that separate statements as to the weight of various components are not required in the labeling of other combination products (R. 234). It is particularly interesting to note that his reason for not applying the requirement to other products, such as TV dinners, is that it is impossible. With regard to the law's application to stuffed turkeys, Mr. Madden feels that it is merely impractical (R. 233). Appellants submit that it is not any more impossible in the one instance than the other and, whether or not it be possible, it is certainly impractical in both instances. The enforcement of the law with regard to one item and not other items included within the same legislative classification is purely whimsical, capricious, arbitrary and unsupported as to reasonableness by either Mr. Madden or any other witness; and, it is therefore clearly a violation of the appellants' constitutional guaranty of equal protection of law.

The question of equal protection is to be answered by practical considerations based on experience, such as whether a classification has relation to the purpose for which it is made, rather than by theoretical inconsistency. *Railway Express Agency* v. *New York,* 336 U. S. 106. The prohibitions of the Fourteenth Amendment extend to all actions of a State denying protection of the laws, whatever the agency of the State taking the action or whatever the guise in which it is taken. *Cooper* v. *Aaron,* 358 U. S. 1, 20.

A state does not ordinarily violate the equal protection of the laws requirement when the statutory provision complained of is applied equally to enterprises located both within and without the state. However, in this situation, the state statute denies the equal protection of law because it operates to exclude all such products of extra-state enterprises because they bear the Federally approved label, or, conversely because it is impossible for them to comply with the State Statute without violating the Federal Statute.

A foreign manufacturer must ship its product in interstate commerce and, therefore, must comply with the Federal Poultry Products Inspection Act which requires total net weight label. Such a label precludes the product from the New York market. New York's exclusion of products bearing the federally approved label denies to appellants the equal protection of law guaranteed to them by the Fourteenth Amendment.

Because of substantial issues of unconstitutionality under the Supremacy Clause, the Commerce Clause and the Fourteenth Amendment, this case was properly heard by a Three-Judge District Court, pursuant to 28 U. S. C. 2281.

Section 2281 of Title 28 U. S. C. provides that an injunction restraining enforcement of a state statute may not be granted on the ground of constitutionality of such statute "unless the application therefor is heard and determined by a district court of three judges . . . " Section 1253 of Title 28 U. S. C. provides that any order granting or denying an injunction in any civil action required by any Act of Congress to be heard and determined by a district court of three judges may be appealed directly to the Supreme Court.

The Court below expressed serious doubt as to the applicability of Section 2281 to this cause. In its opinion, however, the Court referred only to the case of *Kesler* v. *Department of Public Safety of Utah,* 369 U. S. 153. As will appear below, it is doubtful the decision in *Kesler* and the distinction therein articulated are applicable to this case. However, assuming, *arguendo,* that they may be, it still would appear that this was a proper case for the application of Section 2281 and therefore a proper subject for direct appeal to this Court.

In *Kesler,* the Court held that where the conflict between state and federal statutes was immediately apparent, so that the constitutional issue under the Supremacy Clause of the Constitution could be reached without intermediate steps of statutory construction, Section 2281 could be properly invoked. However, as noted by the Court below, the Supreme Court did not reach a constitutional issue in *Kesler* without considerable construction of both the Bankruptcy Act and the Utah Motor Vehicle Safety Responsibility Act. Thus, the issue would appear to be whether this case requires more statutory construction than was required in *Kesler*. Unlike *Kesler*, no serious problem is here involved in discovering the meaning and application of the New York Statute and Regulation. New York's requirement is clear and undisputed, whereas there was substantial controversy as to whether the purpose of the Utah law was to foster motor vehicle safety or the collection of judgments. The Courts in both cases sought the policy underlying the federal enactments in order to determine whether the apparent conflict was irreconcilable. Thus, this case appears to involve less, but in any event, not more statutory construction than *Kesler*. Therefore, even under the rule laid down by the Supreme Court in *Kesler*, it appears that this case is properly in this Court.

It should be noted, however, that the sole challenge to the constitutionality of the Utah statute in *Kesler* was based upon conflict with the Federal Bankruptcy Act. In that respect, the case at bar is substantially different because appellants here also rely upon violation of the Commerce Clause and the Fourteenth Amendment. The Court below apparently confined its attention to *Kesler* because of its feeling that, on the proof adduced at the trial, these other allegations of unconstitutionality were insubstantial. Therefore, it concluded that this case rested on the same basis as *Kesler*.

However, the arguments made by appellants elsewhere in this brief should convince the Court that the challenges to the constitutionality of the New York statute and regulations are not without substance.

Furthermore, it would appear that this case should more properly be considered in the light of the rule enunciated by this Court in *Florida Lime and Avocado Growers* v. *Jacobsen,* 362 U. S. 73. There, this Court adopted the position that a Three-Judge Court is properly convened under Section 2281 in any case in which an injunction may be granted on ground of federal unconstitutionality. In that case, as in this, plaintiff sought an injunction on grounds of (1) conflict with a federal statute, (2) violation of the Commerce Clause of the United States Constitution, and (3) violation of the rights guaranteed by the Fourteenth Amendment.

After reviewing the history of Section 2281 and its antecedents, the Court said at page 80:

> "Section 2281, read in the light of this background, seems clearly to require that when, in any action to enjoin enforcement of a state statute, the injunctive decree may issue on the ground of federal unconstitutionality of the state statute, the convening of a three-judge court is necessary; and the joining in the complaint of a non-constitutional attack along with the constitutional one does not dispense with the necessity to convene such a court. To hold to the contrary would be to permit one federal district judge to enjoin enforcement of a state statute on the ground of federal unconstitutionality whenever a non-constitutional ground of attack was also alleged, and this might well defeat the purpose of Section 2281."

From a thorough reading of the *Jacobsen* case, it is plain that the determination of the propriety of convening a Three-Judge Court under Section 2281 is to be determined upon a reading of the complaint. The issue of the jurisdiction of a Three-Judge Court depends upon the allegation of substantial grounds of federal unconstitutionality. Section 2281 does not intend that the question of the court's jurisdiction shall be postponed until after a trial has been concluded.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed and the cause remanded to the District Court with instructions to enter judgment for appellants declaring the New York Statute and Regulation unconstitutional and granting an injunction as prayed for in the complaint.

Respectfully submitted,

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APPENDIX A

Statutes

PUBLIC LAW 85-172

85TH CONGRESS, S. 1747

August 28, 1957

AN ACT

—71 Stat. 441—

To provide for the compulsory inspection by the United States Department of Agriculture of poultry and poultry products.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act [Poultry Products Inspection Act] may be cited as the "Poultry Products Inspection Act".

LEGISLATIVE FINDING

SEC. 2. Wholesome poultry products are an important source of the Nation's total supply of food. Such products are consumed throughout the Nation and substantial quantities thereof move in interstate and foreign commerce. Unwholesome and adulterated poultry products in the channels of interstate or foreign commerce, are injurious to the public welfare, adversely affect the marketing of wholesome poultry products, result in sundry losses to producers, and destroy markets for wholesome poultry products. The marketing of wholesome poultry products is affected with the public interest and directly affects the welfare of the people. All poultry and poultry products which have or are required to have inspection under this Act are either in the current of interstate or foreign commerce or directly affect such commerce. That part that enters directly into the current of interstate or foreign commerce cannot be effectively inspected and regulated without also inspecting and regulating all poultry and poultry products processed or handled in the same establishment.

The great volume of poultry products required as an article of food for the inhabitants of large centers of population may directly affect the movement of poultry and poultry products in interstate commerce. To protect interstate commerce in poultry and poultry products inspected for wholesomeness, from being adversely burdened, obstructed, or affected by uninspected poultry or poultry products, major consuming areas where poultry or poultry products are handled or consumed in such volume as to affect the movement of inspected poultry or poultry products in interstate commerce should be designated by the Secretary pursuant to the provisions of this Act.

DECLARATION OF POLICY

SEC. 3. It is hereby declared to be the policy of Congress to provide for the inspection of poultry and poultry products by the inspection service as herein provided to prevent the movement in interstate or foreign commerce or in a designated major consuming area of poultry products which are unwholesome, adulterated, or otherwise unfit for human food.

DEFINITIONS

SEC. 4. For purposes of this Act—

(a) The term "commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State or the District of Columbia, but through any place outside thereof; or within the District of Columbia.

(b) The term "Secretary" means the Secretary of Agriculture.

(c) The term "person" means any individual, partnership, corporation, association, or any other business unit.

(d) The term "poultry" means any live or slaughtered domesticated bird.

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(e) The term "poultry product" means any poultry which has been slaughtered for human food from which the blood, feathers, feet, head, and viscera have been removed in accordance with rules and regulations promulgated by the Secretary, any edible part of poultry, or, unless exempted by the Secretary, any human food product consisting of any edible part of poultry separately or in combination with other ingredients.

(f) The term "wholesome" means sound, healthful, clean, and otherwise fit for human food.

(g) The term "unwholesome" means:

(1) Unsound, injurious to health, or otherwise rendered unfit for human food.

(2) Consisting in whole or in part of any filthy, putrid, or decomposed substance.

(3) Processed, prepared, packed, or held under unsanitary conditions whereby a poultry carcass or parts thereof or any poultry product may have become contaminated with filth or whereby a poultry product may have been rendered injurious to health.

(4) Produced in whole or in part from poultry which has died otherwise than by slaughter.

(5) Packaged in a container composed of any poisonous or deleterious substance which may render the contents injurious to health.

(h) The term "adulterated" shall apply to poultry and poultry products under one or more of the following circumstances:

(1) If they bear or contain any poisonous or deleterious substance which may render them injurious to health; but, in case the substance is not an added substance, such poultry and poultry products shall not be considered adulterated under this clause if the quantity of such substance in such poultry and poultry products does not ordinarily render them injurious to health.

(2) If they bear or contain any added poisonous or added deleterious substance, unless such substance is permitted in their production or unavoidable under good manufacturing practices as may be determined by rules and regulations hereunder prescribed by the Secretary or other provisions of Federal law limiting or tolerating the quantity of such added substance on or in such poultry and poultry products: *Provided,* That any quantity of such added substance exceeding the limits so fixed shall also be deemed to constitute adulteration.

(3) If any substance has been substituted, wholly or in part, therefor.

(4) If damage or inferiority has been concealed in any manner.

(5) If any valuable constituent has been in whole or in part omitted or abstracted therefrom.

(6) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

(i) The term "inspector" means: (1) an employee or official of the United States Government authorized by the Secretary to inspect poultry and poultry products under the authority of this Act, or (2) any employee or official of any State government authorized by the Secretary to inspect poultry and poultry products under authority of this Act, under an agreement entered into between the Secretary and the appropriate State agency.

(j) The term "official inspection mark" means the symbol, formulated pursuant to rules and regulations prescribed by the Secretary, stating that the product was inspected.

(k) The term "inspection service" means the official Government service within the Department of Agriculture

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designated by the Secretary as having the responsibility for carrying out the provisions of this Act.

(l) The terms "container" or "package" include any box, can, tin, cloth, plastic, or any other receptacle, wrapper, or cover.

(m) The term "official establishment" means any establishment as determined by the Secretary at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained under the authority of this Act.

(n) The term "label" means any written, printed, or graphic material upon the shipping container, if any, or upon the immediate container, including but not limited to an individual consumer package, of the poultry product, or accompanying such product.

(o) The term "shipping container" means any container used or intended for use in packaging the product packed in an immediate container.

(p) The term "immediate container" includes any consumer package; or any other container in which poultry carcasses or poultry products, not consumer packaged, are packed.

DESIGNATION

SEC. 5. Upon application by any appropriate State or local official or agency of a substantial portion of any major consuming area or upon application by an appropriate local poultry industry group in such an area, where the Secretary has reason to believe that poultry or poultry products are handled or consumed in such volume as to affect, burden, or obstruct the movement of inspected poultry products in interstate commerce, the Secretary shall conduct a public hearing to ascertain whether or not it will tend to effectuate the purposes of this Act for such area to be subject to the provisions of this Act. If after public hearing the Secretary finds that poultry or poultry products are handled or consumed in such volume as to affect, burden, or obstruct the movement of inspected poultry products in commerce and that the designation of such area will tend to effectuate the purposes of this Act, he shall by order designate such area and prescribe the provisions of this Act which shall be applicable thereto and grant such exemptions therefrom as he determines practicable. Such designation [Publication in F. R.] shall not become effective until six months after the notice thereof is published in the Federal Register. On and after the effective date of such designation, all poultry and poultry products processed, sold, received, or delivered in any such area shall be subject to the provisions of this Act.

ANTE MORTEM AND POST MORTEM INSPECTION, REINSPECTION, AND QUARANTINE

SEC. 6. (a) For the purpose of preventing the entry into or flow or movement in commerce or a designated major consuming area of any poultry product which is unwholesome or adulterated, the Secretary shall, where and to the extent considered by him necessary, cause to be made by inspectors ante mortem inspection of poultry in any official establishment processing poultry or poultry products for commerce or in, or for marketing in a designated city or area.

(b) The Secretary, whenever processing operations are being conducted, shall cause to be made by inspectors post mortem inspection of the carcass of each bird processed, and at any time such quarantine, segregation, reinspection as he deems necessary of poultry and poultry products in each official establishment processing such poultry or poultry products for commerce or in, or for marketing in a designated city or area.

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(c) All poultry carcasses and parts thereof and poultry products found to be unwholesome or adulterated shall be condemned and shall, if no appeal be taken from such determination of condemnation, be destroyed for human food purposes under the supervision of an inspector: *Provided,* That carcasses, parts, and products, which may by reprocessing be made not unwholesome and not adulterated, need not be so condemned and destroyed if so reprocessed under the supervision of an inspector and thereafter found to be not unwholesome and not adulterated. If an appeal be taken from such determination, the carcasses, parts, or products shall be appropriately marked and segregated pending completion of an appeal inspection, which appeal shall be at the cost of the appellant if the Secretary determines that the appeal is frivolous. If the determination of condemnation is sustained the carcasses, parts, and products shall be destroyed for human food purposes under the supervision of an inspector.

SANITATION, FACILITIES, AND PRACTICES

SEC. 7. (a) Each official establishment slaughtering poultry or processing poultry products for commerce or in or for marketing in a designated major consuming area shall have such premises, facilities, and equipment, and be operated in accordance with such sanitary practices, as are required by regulations promulgated by the Secretary for the purpose of preventing the entry into or flow or movement in commerce or in a designated major consuming area, of poultry products which are unwholesome or adulterated.

(b) The Secretary shall refuse to render inspection to any establishment whose premises, facilities, or equipment, or the operation thereof, fail to meet the requirements of this section.

LABELING

SEC. 8. (a) Each shipping container of any poultry product inspected under the authority of this Act and found to be wholesome and not adulterated, shall at the time such product leaves the official establishment bear, in distinctly legible form, the official inspection mark and the approved plant number of the official establishment in which the contents were processed. Each immediate container of any poultry product inspected under the authority of this Act and found to be wholesome and not adulterated shall at the time such product leaves the official establishment bear, in addition to the official inspection mark, in distinctly legible form, the name of the product, a statement of ingredients if fabricated from two or more ingredients including a declaration as to artificial flavors, colors, or preservatives, if any, the net weight or other appropriate measure of the contents, the name and address of the processor and the approved plant number of the official establishment in which the contents were processed. The name and address of the distributor may be used in lieu of the name and address of the processor if the approved plant number is used to identify the official establishment in which the poultry product was prepared and packed. The Secretary may permit reasonable variations and grant exemptions from the foregoing labeling requirements in any manner not in conflict with the purposes of this Act.

(b) The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this Act or the container thereof which is false or misleading in any particular is prohibited. No poultry products inspected or required to be inspected pursuant to the provisions of this Act shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but estab-

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lished trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Secretary, he may request a hearing, but the use of the label shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless within thirty days after the receipt of notice of such final determination the person adversely affected thereby appeals to the United States court of appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 204 of the Packers and Stockyards Act of 1921 [42 Stat. 162], as amended [7 U. S. C. 194], shall be applicable to appeals taken under this section.

PROHIBITED ACTS

SEC. 9. The following acts or the causing thereof are hereby prohibited:

(a) The processing, sale or offering for sale, transportation, or delivery or receiving for transportation, in commerce or in a designated major consuming area of any poultry product, unless such poultry product has been inspected for wholesomeness and unless the shipping container, if any, and the immediate container are marked in accordance with the provisions of this Act.

(b) The sale or other disposition for human food of any poultry or poultry product which has been inspected and declared to be unwholesome or adulterated under this Act.

(c) Falsely making or issuing, altering, forging, simulating, or counterfeiting any official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, used in connection with the inspection of poultry or poultry products under this Act, or causing, procuring, aiding, assisting in, or being a party to, such false making, issuing, altering, forging, simulating, or counterfeiting, or knowingly possessing, without promptly notifying the Secretary of Agriculture or his representative, uttering, publishing, or using as true, or causing to be uttered, published, or used as true, any such falsely made or issued, altered, forged, simulated, or counterfeited official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, or representing that any poultry or poultry product has been officially inspected under the authority of this Act when such poultry or poultry product has in fact not been so inspected.

(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product.

(e) The use of any container bearing an official inspection mark except for the poultry product in the original form in which it was inspected and covered by said mark unless the mark is removed, obliterated, or otherwise destroyed.

(f) The refusal to permit access by any duly authorized representative of the Secretary, at all reasonable times, to the premises of an establishment engaged in processing poultry or poultry products for commerce, or in or for marketing in a designated major consuming area, upon presentation of appropriate credentials.

(g) The refusal to permit access to and the copying of any record as authorized by section 11 of this Act.

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(h) The using by any person to his own advantage, or revealing, other than to the authorized representatives of the Government in their official capacity, or to the courts when relevant in any judicial proceeding under this Act, any information acquired under the authority of this Act, concerning any matter which as a trade secret is entitled to protection.

(i) Delivering, receiving, transporting, selling, or offering for sale or transport for human consumption any slaughtered poultry or any part thereof, separately or in combination with other ingredients (other than poultry products as defined in this Act), in commerce or from an official establishment or in a designated major consuming area, except as may be authorized by and pursuant to rules and regulations prescribed by the Secretary.

COMPLETE COVERAGE OF OFFICIAL ESTABLISHMENTS

SEC. 10. No establishment processing poultry or poultry products for commerce or in or for marketing in a designated major consuming area shall process any poultry or poultry product except in compliance with the requirements of this Act.

RECORDS OF INTERSTATE SHIPMENT

SEC. 11. For the purpose of enforcing the provisions of this Act, persons engaged in the business of processing, transporting, shipping, or receiving poultry slaughtered for human consumption or poultry products in commerce or in a designated major consuming area, or holding such products so received shall maintain records showing, to the extent that they are concerned therewith, the receipt, delivery, sale, movement, or disposition of poultry and poultry products and shall, upon the request of a duly authorized representative of the Secretary, permit him at reasonable times to have access to and to copy all such records. Any record required to be maintained by this section shall be maintained for a period of two years after the transaction, which is the subject of such record, has taken place.

PENALTIES

SEC. 12. (a) Any person who violates the provisions of section 9, 10, 11, or 17, shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than six months, or a fine of not more than $3,000, or both such imprisonment and fine; but if such violation is committed after one conviction of such person under this section has become final such person shall be subject to imprisonment for not more than one year, or a fine of not more than $5,000, or both such imprisonment and fine; but if such violation is committed after two or more convictions of such person under this section have become final such person shall be subject to imprisonment for not more than two years, or a fine of not more than $10,000, or both such imprisonment and fine. When construing or enforcing the provisions of said sections the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association within the scope of his employment or office shall in every case be deemed the act, omission, or failure of such individual, partnership, corporation, or association, as well as of such person.

(b) No carrier shall be subject to the penalties of this Act, other than the penalties for violation of section 11, by reason of his receipt, carriage, holding, or delivery, in the usual course of business, as a carrier, of slaughtered poultry or poultry products, owned by another person unless the carrier has knowledge, or is in possession of facts which

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would cause a reasonable person to believe that such slaughtered poultry or poultry products were not inspected or marked in accordance with the provisions of this Act or were not otherwise eligible for transportation under this Act.

Reporting of Violations

Sec. 13. Before any violation of this Act is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given reasonable notice of the alleged violation and opportunity to present his views orally or in writing with regard to such contemplated proceeding. Nothing in this Act shall be construed as requiring the Secretary to report for criminal prosecution violations of this Act whenever he believes that the public interest will be adequately served and compliance with the Act obtained by a suitable written notice or warning.

REGULATIONS

SEC. 14. The Secretary shall promulgate such rules and regulations as are necessary to carry out the provisions of this Act.

EXEMPTIONS

SEC. 15. (a) The Secretary shall, by regulation and under such conditions as to sanitary standards, practices, and procedures as he may prescribe, exempt from specific provisions of this Act—

> (1) poultry producers with respect to poultry of their own raising on their own farms which they sell directly to household consumers or restaurants, hotels, and boarding houses for use in their own dining rooms or in the preparation of meals for sales direct to consumers only: *Provided,* That such poultry producers do not engage in buying or selling poultry products other than those produced from poultry raised on their own farms;
>
> (2) retail dealers with respect to poultry products sold directly to consumers in individual retail stores, if the only processing operation performed by such retail dealers is the cutting up of poultry products on the premises where such sales to consumers are made;
>
> (3) for such period of time as the Secretary determines that it would be impracticable to provide inspection and exemption will aid in the effective administration of this Act, any person engaged in the processing of poultry or poultry products for commerce and the poultry or poultry products processed by such person: *Provided, however,* That no such exemption shall continue in effect on and after July 1, 1960; and

(4) persons slaughtering, processing, or otherwise handling poultry or poultry products which have been or are to be processed as required by recognized religious dietary laws, to the extent that the Secretary determines necessary to avoid conflict with such requirements while still effectuating the purposes of this Act.

(b) The Secretary may by order suspend or terminate any exemption under this section with respect to any person whenever he finds that such action will aid in effectuating the purposes of this Act.

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VIOLATIONS BY EXEMPTED PERSONS

SEC. 16. Any person who sells, delivers, transports or offers for sale or transportation in commerce or in a designated major consuming area any poultry or poultry products which are exempt under section 15, and which are unwholesome or adulterated and are intended for human consumption, shall be guilty of a misdemeanor and shall on conviction thereof be subject to the penalties set forth in section 12.

IMPORTS

SEC. 17. (a) No slaughtered poultry, or parts or products thereof, of any kind shall be imported into the United States unless they are healthful, wholesome, fit for human food, not adulterated, and contain no dye, chemical, preservative, or ingredient which renders them unhealthful, unwholesome, adulterated, or unfit for human food and unless they also comply with the rules and regulations made by the Secretary of Agriculture to assure that imported poultry or poultry products comply with the standards provided for in this Act. All imported, slaughtered poultry, or parts or products thereof, shall after entry into the United States in compliance with such rules and regulations be deemed and treated as domestic slaughtered poultry, or parts or products thereof, within the meaning and subject to the provisions of this Act and the Federal Food, Drug, and Cosmetic Act [52 Stat. 1040], and Acts amendatory of [21 U. S. C. 301], supplemental to, or in substitution for such Acts.

(b) The Secretary of Agriculture is authorized to make rules and regulations to carry out the purposes of this section and in such rules and regulations the Secretary of Agriculture may prescribe the terms and conditions for the destruction of all slaughtered poultry, or parts or products thereof, offered for entry and refused admission into the United States unless such slaughtered poultry, or parts or products thereof, be exported by the consignee within the time fixed therefor in such rules and regulations.

(c) All charges for storage, cartage, and labor with respect to any product which is refused admission pursuant to this section shall be paid by the owner or consignee, and in default of such payment shall constitute a lien against any other products imported thereafter by or for such owner or consignee.

GENERAL PROVISIONS

SEC. 18. (a) For the purpose of preventing and eliminating burdens on commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this Act shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act, as amended [21 U. S. C. 301], to the extent of the application or the extension thereto of the provisions of this Act.

(b) In carrying out the provisions of this Act, the Secretary may cooperate with other branches of Government and with State agencies and may conduct such examinations, investigations, and inspections as he determines practicable through any officer or employee of a State commissioned by the Secretary for such purpose.

COST OF INSPECTION

SEC. 19. The cost of inspection rendered under the requirements of this Act, shall be borne by the United States, except that the cost of overtime and holiday work performed in establishments subject to the provisions of this Act at such rates as the Secretary may determine shall be borne by such establishments. Sums received by the Secretary in

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reimbursement for sums paid out by him for such premium pay work shall be available without fiscal year limitation to carry out the purposes of this section.

APPROPRIATIONS

SEC. 20. There is hereby authorized to be appropriated such sums as are necessary to carry out the provisions of this Act.

SEPARABILITY OF PROVISIONS

SEC. 21. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

EFFECTIVE DATE

SEC. 22. This Act shall take effect upon enactment, except that no person shall be subject to the provisions of this Act prior to January 1, 1959, unless such person after January 1, 1958, applies for and receives inspection for poultry or poultry products in accordance with the provisions of this Act and pursuant to regulations promulgated by the Secretary hereunder, in any establishment processing poultry or poultry products in commerce or in a designated major consuming area. Any person who voluntarily applies for and receives such inspection after January 1, 1958, shall be subject, on and after the date he commences to receive such inspection, to all of the provisions and penalties provided for in this Act with respect to all poultry or poultry products handled in the establishment for which such said application for inspection is made.

Approved August 28, 1957.

Regulations Governing the Inspection of Poultry and Poultry Products
(7 C. F. R. Part 81)

DEFINITIONS

§81.1 *Definitions.* For the purposes of the regulations in this part, unless the context otherwise requires, the following terms shall have the following meanings:

Acceptable. "Acceptable" means suitable for the purpose intended and acceptable to the Administrator.

Act. "Act" means the Poultry Products Inspection Act (71 Stat. 441).

Administrator. "Administrator" means the Administrator of the Agricultural Marketing Service of the Department or any other officer or employee of the Department to whom there has heretofore been delegated, or to whom there may hereafter be delegated the authority to act in his stead.

Adulterated. "Adulterated" shall apply to poultry and poultry products under one or more of the following circumstances:

(1) If they bear or contain any poisonous or deleterious substance which may render them injurious to health, but, in case the substance is not an added substance, such poultry and poultry products shall not be considered adulterated under this clause if the quantity of such substance in such poultry and poultry products does not ordinarily render them injurious to health.

(2) If they bear or contain any added poisonous or added deleterious substance, unless such substance is permitted in their production or unavoidable under good manufacturing practices as may be determined by the regulations in this part or other provisions of Federal law limiting or tolerating the quantity of such added substance on or in such poultry and poultry products: *Provided*, That any quantity of such added substance exceeding the limits so fixed shall also be deemed to constitute adulteration.

(3) If any substance has been substituted, wholly or in part, therefor.

(4) If damage or inferiority has been concealed in any manner.

(5) If any valuable constituent has been in whole or in part omitted or abstracted therefrom.

(6) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

Applicant. "Applicant" means any person who requests any inspection service.

Commerce. "Commerce" means commerce between any State, Territory, or possession or the District of Columbia, and any place outside thereof; or between points within the same State, or the District of Columbia, but through any place outside thereof; or within the District of Columbia, or between a designated major consuming area and any point outside thereof; or within a designated major consuming area.

Consumer package. "Consumer package" means any container in which a poultry product is enclosed for the purpose of display and sale to household consumers.

Container or package. "Container or package" includes any box, can, tin, cloth, plastic, or any other receptacle, wrapper, or cover.

Department. "Department" means the United States Department of Agriculture.

Dressed poultry. "Dressed poultry" means poultry which has been slaughtered for human food with head, feet, and viscera intact and from which the blood and feathers have been removed.

Dressed poultry identification mark. "Dressed poultry identification mark" means the symbol formulated pursuant to the regulations in this part stating that the dressed poultry is eligible for further processing in official establishments under USDA inspection.

Food product containing poultry product. "Food product containing poultry product" means any article of food for human consumption which is prepared in part from ready-to-cook poultry, but which has been exempted by the Administrator from the category of a poultry food product.

Free from protruding pinfeathers. "Free from protruding pinfeathers" means that the carcass is free from protruding pinfeathers which are visible to an inspector during an examination of the carcass at normal operating speeds. However, a carcass may be considered as being free from protruding pinfeathers if it has a generally clean appearance (especially on the breast), and if not more than an occasional protruding pinfeather is in evidence during a more careful examination of the carcass.

Giblets. "Giblets" means the liver from which the bile sac has been removed, the heart from which the pericardial sac has been removed, and the gizzard from which the lining and contents have been removed: *Provided,* That each such organ has been properly trimmed and washed.

Immediate container. The term "immediate container" includes any consumer package; or any other container in which poultry carcasses or poultry products, not consumer packaged, are packed.

Inspected for wholesomeness. "Inspected for wholesomeness" means, with respect to any poultry product, that it has undergone an inspection and was found at the time of such inspection to be wholesome and not adulterated.

Inspection. "Inspection" means any ante mortem examination of poultry or any post-mortem inspection of dressed poultry at the time of evisceration or any inspection by an inspector to determine in accordance with the regulations in this part (1) the wholesomeness of any poultry product at any stage of the preparation or packaging thereof in the official establishment where inspected for wholesomeness, or (2) the wholesomeness of any previously inspected poultry product if such poultry product has not lost its identity as an inspected product.

Inspection service. "Inspection service" means the official service within the Department having the responsibility for carrying out the provisions of the Poultry Products Inspection Act. Inspection service also means the activities performed, including official reporting, by such official service.

Inspector. "Inspector" means (1) an employee or official of the United States Government, authorized by the

Administrator to inspect poultry and poultry products, pursuant to the regulations in this part, or (2) an employee or official of any State government, authorized by the Administrator to inspect poultry and poultry products, pursuant to the regulations in this part, under an agreement entered into between the Agricultural Marketing Service and the appropriate State agency.

Label. "Label" means any written, printed, or graphic material upon the shipping container, if any, or upon the immediate container, including but not limited to an individual consumer package of the poultry product, or accompanying such product.

Official establishment. "Official establishment" means any establishment as determined by the Administrator at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained pursuant to the regulations in this part.

Official identification. "Official identification" means the official inspection mark or the dressed poultry identification mark.

Official inspection mark. "Official inspection mark" means the symbol, formulated pursuant to the regulations in this part, stating that the poultry product was inspected.

Person. "Person" means any individual, partnership, corporation, association, or any other business unit.

Potable water. "Potable water" means water that has been approved by the State health authority or agency or laboratory acceptable to the Administrator as safe for drinking, and suitable for food processing.

Poultry. "Poultry" means any live or slaughtered domesticated bird (chickens, turkeys, ducks, geese or guineas).

Poultry food product. "Poultry food product" means any human food product consisting of any edible part or parts of poultry in combination with other ingredients unless such human food product is exempted by the Administrator.

Poultry product. "Poultry product" means any ready-to-cook poultry or any poultry food product.

Product. "Product" means dressed poultry or poultry product or both.

Ready-to-cook poultry. "Ready-to-cook poultry" means any dressed poultry from which the protruding pinfeathers, vestigial feathers (hair or down as the case may be), head, shanks, crop, oil gland, trachea, esophagus, entrails, reproductive organs and lungs have been removed, and with or without the giblets, is ready to cook without need of further processing. Ready-to-cook poultry also means any cut-up or disjointed portion of poultry or any edible part thereof, as described in this paragraph.

Regulations. "Regulations" means the provisions of this entire part.

Secretary. "Secretary" means the Secretary of the Department, or any other officer or employee of the Department to whom there has heretofore been delegated or to whom there may hereafter be delegated, the authority to act in his stead.

Shipping container. "Shipping container" means any container used or intended for use in packaging the product packed in an immediate container.

Slaughter. "Slaughter" means the act of killing poultry for human food in accordance with good commercial practices in a manner which will result in thorough bleeding of the carcasses.

Unwholesome. "Unwholesome" means:

(1) Unsound, injurious to health, or otherwise rendered unfit for human food.

(2) Consisting in whole or in part of any filthy, putrid, or decomposed substance.

(3) Processed, prepared, packed, or held under unsanitary conditions whereby a poultry carcass or parts thereof or any poultry product may have become contaminated with filth or whereby a poultry product may have been rendered injurious to health.

(4) Produced in whole or in part from poultry which has died otherwise than by slaughter.

(5) Packaged in a container composed of any poisonous or deleterious substance which may render the contents injurious to health.

Wholesome. "Wholesome" means sound, healthful, clean, and otherwise fit for human food.

* * * * *

ADMINISTRATION

§81.3 *Administration.* The Administrator shall perform, for and under the supervision of the Secretary, such duties as are prescribed in the regulations in this part and as the Secretary may require in the administration of the regulations in this part. The Administrator is authorized to waive for limited periods any particular provisions of the regulations to permit experimentation so that new procedures, equipment and processing techniques may be tested to facilitate definite improvements: *Provided,* That such variations from the provisions of the regulations are not in conflict with the purposes of the act. The Administrator is authorized to grant exemptions in accordance with the provisions of the act.

• • • • •

§81.7 *Poultry and poultry products entering or prepared in official establishments.*

All poultry and poultry products processed in an official establishment shall be inspected, handled, prepared, marked and labeled as required by the regulations in this part, and all dressed poultry and poultry products entering an official establishment shall have been inspected and shall be marked as required by the regulations in this part.

• • • • •

LABELING

§81.125 *Containers of poultry required to be labeled.*

Except as may be authorized by the Administrator with respect to shipment of products between official establishments, each shipping container and each immediate container of any product shall at the time it leaves the official establishment bear approved labels containing information in accordance with the provisions set forth in §§81.126 to 81.146, inclusive, and the act.

• • • • •

§81.127 *Labels to be approved by the Administrator.* No label, except printer's proofs bearing official identification shall be printed until the printer's proof or a photostatic copy has been found by the Administrator to be acceptable; and no label or imprint bearing official identification shall be used until finished copies or samples thereof have been approved by the Administrator, except that approval may be given to printer's final proofs or photostatic copies of labels or samples of stenciled and rubber stamped imprints for shipping containers or containers for institutional packs, and no such labels or imprints shall be used until such proofs or copies have been approved by the Administrator.

• • • • •

§81.130 *Wording on labels.* (a) Each label approved for use on an immediate container for poultry products shall bear in distinctly legible form the following information:

(1) The common or usual name of the poultry product.

(2) A statement of ingredients if fabricated from two or more ingredients, including a declaration as to artificial flavors, colors, or preservatives, if any. Such ingredients shall be listed by their common or usual names in the order of their descending proportions. For the purpose of this paragraph, the term "chicken meat," unless modified by an appropriate adjective, is construed to mean deboned white and dark meat; whereas, the term "chicken" may include other edible parts such as skin and fat not in excess of their natural proportions, in addition to the chicken meat. If the term "chicken meat" is listed and the product also contains skin, giblets, or fat, it is necessary to list each such ingredient. This terminology shall apply to poultry products prepared from other kinds of poultry where applicable.

(3) The net weight or other appropriate measure of the contents, except that the Administrator may approve the

use of labels for certain types of immediate containers which do not bear the net weight: *Provided,* That the retailer or distributor supplying the retailer agrees in writing to the Administrator to mark the true net weight on the label prior to display and sale thereof: *And provided further,* That the shipping container bears a statement "Net weight to be marked on consumer packages prior to display and sale": *And provided further,* That the total net weight of the contents of the shipping container shall be marked on such container. The net weight marked on immediate containers of poultry products shall be the net weight of the poultry and shall not include the weights of the wet or dry packaging materials and giblet wrapping materials.

(4) The name and address of the packer or distributor and when the name of the distributor is shown, it shall be qualified by such term as "packed for," "distributed by," or "distributors."

(5) The official inspection mark.

(6) The plant number of the official establishment in which the product was inspected, either within the official inspection mark or clearly visible and in close proximity elsewhere on the exterior of the container, or in the case of canned product, the plant number may be embossed on the lid of each can. In the case of nontransparent consumer packages such as cartons, the plant number may be legibly printed thereon or it may be shown on an insert label placed on top of the product within the package. In the case of transparent wrappers, the plant number may be shown on an insert label and so placed under the transparent covering that it will be clearly visible and legible.

(b) Each label approved for use on a shipping container shall bear in distinctly legible form the following information:

(1) The official inspection mark.

(2) The plant number of the official establishment in which the product was inspected, either within the official inspection mark, or elsewhere on the container clearly visible and in close proximity to the official inspection mark.

(c) Any label which bears the official inspection mark or any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of the regulations shall not bear any statement that is false or misleading. If the Administrator has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Administrator may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Administrator, he may request a hearing, but the use of the label shall, if the Administrator so directs, be withheld pending hearing and final determination by the Administrator. Any person so denied the approval of any label shall be notified promptly of the reasons for the denial. A written application for a hearing with respect to the denial may be filed by said person with the Administrator within 10 days after notice of the denial. Such petition shall state specifically the errors alleged to have been made by the Administrator in denying approval of the label. After consideration of the facts adduced at the hearing, any determination with respect to the matter by the Administrator shall be conclusive unless, within 30 days after the receipt of notice of such final determination, the person adversely affected thereby appeals to the United States Court of Appeals for the Circuit in which he has his principal place of business, or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 204 of the Packers and Stockyards Act of 1921, as amended, shall be applicable to appeals taken under this section.

* * * * *

Agricultural and Markets Law of the State of New York

§193. *Method of sale of food and food products*

1. Definition of "food" and "food product". The terms "food" and "food product" as used in this section shall include all material, solid, liquid or mixed, whether simple or compound, used or intended for consumption by human beings or domestic animals normally kept as household pets and shall also include all substances or ingredients to be added thereto for any purpose.

2. All food and food products which are sold, offered or exposed for sale by wholesalers, packers, distributors or jobbers shall be sold or offered for sale by net weight, numerical count or standard measure, whichever term shall be applicable, and shall be plainly marked by such person or persons offering the food or food products for sale, in such form or manner as may be prescribed by the commissioner, except that it shall not be necessary to so mark meat, meat products or fish, except shellfish in natural form, provided the net weight be stated on a written invoice and on the shipping container of the meat, meat product or fish.

3. All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the commissioner.

4. All food and food products which are packaged or wrapped by the retailer in advance of being exposed or offered for sale by the retailer shall be accurately marked in such form or manner as may be prescribed by the commissioner, with (a) the net weight or standard measure

or numerical count; (b) the selling price per pound or unit of standard measure, and (c) the total selling price.

5. Wherever food or food products are packaged or wrapped for sale by a retailer in advance of being sold or offered for sale, an accurate computing scale shall be maintained so placed as to be easily available to customers.

6. This section shall not apply to sales of (a) eggs, fresh fruits, fresh vegetables, grains and nuts; (b) milk and cream as set forth in section one hundred ninety-one of this chapter; (c) malt beverages as set forth in section one hundred ninety-two-c of this chapter; (d) bread, as set forth in section one hundred ninety-three-a of this chapter; (e) frozen desserts as set forth in section one hundred ninety-three-d of this chapter; (f) alcoholic beverages; and (g) drugs and pharmaceuticals. Added L. 1962, c. 770, §2; amended L. 1963, c. 377, eff. April 16, 1963.

New York State Regulations

STATE OF NEW YORK

DEPARTMENT OF AGRICULTURE AND MARKETS

WEIGHTS AND MEASURES MANUAL—Circular 834

221.9. METHOD OF SALE OF SPECIFIC COMMODITIES

* * * * *

(c) *Meat, poultry and fish.* Except for immediate consumption on the premises where sold or as one of several elements comprising a ready-to-eat meal sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat food products, poultry (whole or parts) and all seafood except shellfish, offered or exposed for sale or sold, as food shall be offered or exposed for sale and sold by net weight. The meaning of the words meat and meat food products as used in this section is that defined in Section 96-g of the Agriculture and Markets Law.

* * * * *

221.40. MEAT, POULTRY AND FISH. Meat, poultry and fish shall be sold or offered for sale as food at retail by net weight only.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 9

SWIFT & COMPANY, INC., and ARMOUR AND COMPANY,
Appellants,

—v.—

DON J. WICKHAM, Commissioner of Agriculture
and Markets of the State of New York,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF INSTITUTE OF AMERICAN POULTRY INDUSTRIES AS AN *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF OF INSTITUTE OF AMERICAN POULTRY INDUSTRIES AS AN *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

This brief is accompanied by written consent of all parties to the case as provided by Rule 42 of the Court.

Interest of *Amicus Curiae*

The Institute of American Poultry Industries is a national voluntary non-profit association. It was organized in 1926 and is comprised of over 500 member firms. Its members are engaged in all phases of the egg and poultry industries, and include producers, breeders, cooperatives, hatcherymen, processors and distributors. All members of the Institute processing poultry for interstate commerce are subject to and are regulated under the provisions of the Poultry Products Inspection Act, 21 U. S. C. 451, 71 Stat. 441.

The poultry and egg industry is the third largest producer of cash farm income and is one of the major segments of American agriculture which functions without the benefit of governmental price support programs. Its welfare is directly dependent upon the acceptance of its products by the consuming public, the law of supply and demand, and a system under which its products may enter the market without unreasonable or unnecessary burdens or restrictions.

The decision and opinion of the District Court, if allowed to stand, will have a profound and adverse effect upon the members of the Institute and seriously burden and interfere with commerce in poultry and poultry products.

The interest of the *amicus* goes far beyond its interest in the pending case. This decision, if allowed to stand, would impair if not destroy the federal regulatory scheme established and carried out under the Poultry Products Inspection Act, and subject the industry to the costs and burdens of an unnecessary multiplicity of regulations.

It will be our purpose in this brief to show that the Congress in enacting the Poultry Products Inspection Act intended to and did vest the authority over the inspection and labeling of poultry products exclusively in the Secretary of Agriculture, and that attempts by the State of New York to prohibit the sale of federally inspected and labeled poultry products by the imposition of requirements not in conformity with the Act are invalid under the Commerce and Supremacy Clauses of the Federal Constitution.

Question Presented

May New York lawfully require that poultry products which have been inspected and labeled in conformity with the Poultry Products Inspection Act bear labeling not authorized by the Secretary of Agriculture?

ARGUMENT

I.

The Poultry Products Inspection Act preempts the field of regulation of the labeling of poultry products inspected under the authority of that Act to the exclusion of the operation of the state statute.

The purpose of the Poultry Products Inspection Act is to establish a federal system of protecting the public by assuring consumers that poultry products bearing the official inspection mark have been inspected and found to be wholesome and that all statements appearing on or accompanying the consumer package have been approved, and to protect interstate commerce in poultry products from uninspected and improperly labeled product.

This purpose is clear from the provisions of the Act itself and its legislative history.

The Committee on Agriculture of the House of Representatives in its report on the bill which became the Poultry Products Inspection Act stated:

> "The purpose of this bill is to establish a system of compulsory inspection by the Federal Government of poultry and poultry products in interstate commerce and in major intrastate consuming areas of such size and consequence as to necessarily affect interstate commerce. Such inspection would be rounded out by requirements as to the maintenance of sanitary facilities and practices and *as to correct and informative labeling of products.*" (Italics added.) House Report No. 465, 85th Congress, 1st Session (1957).

The Committee on Agriculture and Forestry of the United States Senate in its report on the bill stated:

> "The purpose of this bill is to provide for (1) the compulsory inspection of poultry and poultry products for wholesomeness, (2) the maintenance of sanitary facilities and practices, and (3) *correct and informative labeling.* (Italics added.) Senate Report No. 195, 85th Congress, 1st Session (1957).

Under the Poultry Products Inspection Act there is established a comprehensive and pervasive regulatory scheme governing the processing, inspection, packaging and labeling of poultry products for the protection of the consuming public.

The federal regulatory program embodies a procedure which requires the prior approval of all labeling material before it may be used in connection with inspected poultry products.[1] After it has been approved, its use is directly controlled by a federal inspector stationed in the plant where the labeling is applied and no product can be marketed unless it is labeled exactly in the approved manner.[2] The Secretary may direct that any label be withheld if he determines it to be false or misleading in any particular, subject to the right to a hearing and appeal.[3] The immediate container of any poultry product which goes to the consumer, as an integral part of its approved label, must also bear the official inspection mark of the United States Department of Agriculture.[4] The official inspection mark constitutes a representation by the United States that the product has been inspected, that its labeling has been approved and is not false or misleading in any particular.[5] Under the Act, the Secretary of Agriculture has the responsibility of providing the consuming public with the protection intended by the Act.[6] The requirements that the official insignia of the United States must appear on the consumer package,[7] and that all other written, printed, or graphic matter which appears on or accompanies the consumer package must be approved before use,[8] clearly bring into being a representation to the consuming public that the statements made on the label of federally inspected poultry products are truthful and accurate. The presence of the official insignia, in effect, makes this appear to be a representation on the part of the United States, and preservation of the integrity of the insignia would seem to demand that nothing be added to or carried on the label which does not have the prior approval of the Secretary of Agriculture.

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[1] 7 CFR, Sec. 81.127 of the Regulations.

[2] 7 CFR, Secs. 81.138, 81.141 of the Regulations.

[3] Section 8(b) of the Act.

[4] 7 CFR, Secs. 81.129, 81.130 of the Regulations.

The labeling authority which is vested in the Secretary of Agriculture under the Poultry Products Inspection Act is a necessary and integral part of the federal regulatory inspection scheme.

It is through the control of labeling that the Secretary of Agriculture maintains control of product identity, classification, standardization, and false and deceptive claims or implications.[9] The federal regulatory scheme of superintendence under which all federally inspected poultry products are required to bear the insignia of the United States Department of Agriculture could not be carried out if states could require supplementary label information to be affixed to the product.

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[5] 7 CFR, Secs. 81.127, 81.129, 81.130, 81.131 of the Regulations.

[6] Sections 4(k) and 14 of the Act.

[7] Section 8(a) of the Act.

[8] Section 4(n) of the Act; 7 CFR, Sec. 81.127 of the Regulations.

[9] 7 CFR, Secs. 81.131, 81.134 of the Regulations.

The intent of Congress to occupy the field with respect to all matters covered by the Poultry Products Inspection Act, including labeling declarations, was not left by the Congress merely for interpretation or implication from the extensive and detailed duties imposed upon the Secretary of Agriculture by the Poultry Products Inspection Act. Section 18(a) of that Act expressly provides that the jurisdiction of the Secretary within the scope of the Act shall be exclusive. This is a specific and unmistakable mandate and expression of Congressional intent to preempt the field. Further, that section explicitly states that this preemption is for the purpose of preventing and eliminating burdens on commerce in poultry and poultry products.

There is no question but that state regulations must yield if it is the clear and manifest purpose of Congress to occupy the field. *Campbell* v. *Hussey,* 368 U. S. 297, 82 S. Ct. 327, 7 L. Ed. 2d 299; *Rice* v. *Santa Fe Elevator Corporation,* 331 U. S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447.

Congress was aware of the need for a uniform system of inspection and labeling of poultry products to eliminate variations in, and multiplicity of, regulation by the several States and the consequent interference with interstate commerce in poultry products. In the hearings on the legislation before the Committee on Agriculture of the United States House of Representatives, Dr. Cliff D. Carpenter, as President of the Institute of American Poultry Industries, stated:

> "Conflicting regulations among different localities had already caused some interference with the growing movement of poultry interstate, even from plants operating under USDA inspection, and both industry and the consumer were faced with the prospect of additional costly and unjustifiable trade barriers." (Hearings before the Subcommittee on Poultry and Eggs of the Committee on Agriculture, House of Representatives, 85th Congress, 1st Session, Serial G at page 74 (1957).)

The legislative history of the Act shows that the language of section 18(a) was inserted in the bill in the House and that it was approved by a Committee of Conference between the two Houses. In explaining the Conference Report to the Senate, the Honorable Hubert H. Humphrey, then Senator Humphrey, submitted a short explanation of the Conference Report which contained the following statement:

> "The conference substitute differs from the Senate bill in that under the substitute . . .
>
> (9) The jurisdiction of the Secretary provided by the bill would expressly be made exclusive." (Congressional Record of August 19, 1957, vol. 103, p. 15169.)

In the detailed statement of explanation of the Conference Report the following statement was made:

> "The conferees agreed on a substitute for the House amendment, which differs from the Senate bill in the following material respects:
>
> * * * * *
>
> "Ninth, the House amendment provided that the jurisdiction of the Secretary of Agriculture within the scope

> of the act would be exclusive. While it is difficult to see how regulation by the Secretary under the act could do otherwise than occupy the field and thereby preclude State regulation of the same subject, this amendment would make it clear that Federal regulation under the bill would preclude State regulation of the same subject.
>
> * * * * *
>
> "Other material points in dispute were determined in accordance with the Senate position as follows:
>
> "... (2) labeling may not be false or misleading 'in any particular'; . . . (4) the House provision providing a rule of construction against invalidation of State law was rejected." (Congressional Record of August 19, 1957, vol. 103, p. 15170.)

There can be no question from the language of the statute and its legislative history but that it was the intent of Congress to occupy the field and preclude State regulation of the matters covered by the Act which include, among other things, all labeling of federally inspected products for the stated purpose of preventing and eliminating burdens on commerce. Inasmuch as the Congress intended to preempt the field, the State regulation must be declared invalid under the Commerce and Supremacy Clauses of the Constitution.

> *Constitution of the United States*, Art. I, Sec. 8, Clause 3; Art. VI, Clause 2;
> *Rice* v. *Santa Fe Elevator Corporation, supra;*
> *Campbell* v. *Hussey, supra.*

II.

The New York statute and regulations are in direct conflict with the Poultry Products Inspection Act and regulations thereunder and must yield.

Section 8 of the Poultry Products Inspection Act requires the consumer package of any poultry product inspected under the authority of the Act to bear, in addition to the official inspection mark, the name of the product, a statement of ingredients if fabricated from two or more ingredients, and the net weight or other appropriate measure of the contents. Any written, printed or graphic matter on the consumer package which is false or misleading in any particular is prohibited. No product name not approved by the Secretary of Agriculture may be used. If the Secretary has reason to believe that any label is false or misleading he may direct that its use be withheld unless it is modified in such manner as he may prescribe so that it will not be false or misleading. The proponent of any label thus rejected may request a hearing on the matter and appeal any final determination, if adverse, to the United States Circuit Court of Appeals.

Under criminal penalty the Act forbids the distribution in commerce of any poultry product unless its consumer package is marked in accordance with the requirements of the Act or if its label is false or misleading in any particular.[10]

Section 14 of the Act directs the Secretary of Agriculture to promulgate rules and regulations necessary to carry out the provisions of the Act.

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[10] Sections 9(a), 9(d), 10, 12(a) of the Act.

In carrying out his duties under the Act, the Secretary of Agriculture has determined that he cannot effectively discharge his responsibilities with respect to labeling without exercising prior approval control over labels to be used on poultry products.[11] Accordingly, the Secretary's regulations require the submission of all labels for examination and approval and no label may be used until approved.[12] No reprint of the official inspection insignia may be used or imprinted on labeling materials until the printer's proof of the label has been approved.[13]

In the case at bar, appellants' labels which were approved by the Secretary of Agriculture for use on appellants' products were the only labels that could lawfully be used. The label approval necessarily involved approval by the Secretary of Agriculture of the name of the product, which in this case was "Stuffed Turkey", and the method of declaring the net weight of the contents of the consumer package, which in this case was the total net weight of the contents, namely the "Stuffed Turkey", a poultry product. Under the Federal Act a poultry product is defined as "any human food product consisting of any edible part of poultry separately or in combination with other ingredients".[14]

The decision of the District Court in upholding the action of the State of New York which prohibits the sale in New York of the federally inspected and labeled poultry product "Stuffed Turkey" unless the product be labeled to show not only the weight of the total poultry product including the stuffing but also to show the weight of the bird without the stuffing, clearly upsets the Federal regulatory scheme and invades the jurisdiction which the Congress vested exclusively in the Secretary of Agriculture and defeats the purposes of the Act. The decision of the District Court in holding that there is no conflict between the State requirements and the Federal requirements as to poultry products in interstate commerce is clearly wrong. The conflict between the State and Federal regulations is unmistakable. It is not a conflict as to a minor detail but goes to the very procedure which has been established for maintaining label control. This is a matter of vital importance and the decision of the court below, if permitted to stand, would clearly frustrate the federal regulatory scheme which has been established under the Poultry Products Inspection Act to assure truthful, accurate, nondeceptive and nonmisleading labeling (including product identification) on the consumer package. It is essential that the Secretary of Agriculture exercise this control if he is to carry out his responsibilities under the Act and if he is to protect the integrity of the insignia of the United States which is required to be on the labeling of poultry products which meet the requirements of the Act.

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[11] 7 CFR, Sec. 81.125 of the Regulations.

[12] 7 CFR, Sec. 81.126 of the Regulations.

[13] 7 CFR, Sec. 81.127 of the Regulations.

[14] Section 4(e) of the Act.

A holding of federal exclusion of the New York law seems inescapable inasmuch as compliance with both the Federal law and the State law is impossible. Under the Federal law the label used on product must be approved by the Secretary of Agriculture before the product may enter into interstate commerce. The State regulation requires a different label, one not approved by federal authority and one which would, in fact, violate or require the violation of the Federal Act. The conflict is therefore head-on. Two schemes of regulation cannot stand in the same area. Under such circumstances the State regulation must give way in order not to impair the federal superintendence of the field. *McDermott* v. ***Wisconsin***, 228 U. S. 115, 33 S. Ct. 431, 57 L. Ed. 754.

The observation by the court below that New York's position does not demand any modification in the weight label adjacent to the official inspection mark and its assumption that "New York would be satisfied, as indeed it must be, so long as somewhere on the container there is a statement of the net weight of the bird before stuffing, on which, if need be, any Federal responsibility could be expressly disclaimed" [15] impels us to the conclusion that the court below did not understand that under the Federal Act and regulations thereunder the appellants are not allowed to use any labels that have not been approved by the Secretary of Agriculture, that no multiple weight labels as required by New York for stuffed turkeys have been approved by the Secretary of Agriculture, and that the State of New York is, therefore, requiring the labeling of product as a condition for sale in New York in a manner prohibited by Federal law. The labeling requirement of the New York law would *pro tanto* supplant the federal regulation with another scheme and compromise the Congressional policy expressed in the Poultry Products Inspection Act.

While it is recognized that the State of New York has a legitimate interest in the subject matter of proper labeling, its interest is being and can be adequately served by the federal program of inspection and labeling. The regulations under the Poultry Products Inspection Act authorize the establishment of "specifications covering the principal constituents of any poultry food product with respect to which a specified name of the product or other labeling terminology may be used, whenever such action is necessary to prevent sale of the product under a false or deceptive name or other false or misleading labeling."[16] If New York believes that further protection is needed it should seek to invoke this additional protection through the Poultry Products Inspection Act instead of attempting to invade the jurisdiction of the Secretary of Agriculture.

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[15] 230 F. Supp. at p. 408.

The State's interest would be but slightly impaired, if at all, by the suppression of the applicability of its law and regulation to federally inspected and labeled poultry products. The court below pointed out that neither the New York statute nor regulation defines the term "net weight" used in the statute but stated that "The Director of the Bureau of Weights and Measures of the Department testified that he interpreted the regulation, as applied to stuffed turkeys, to require statement of the net weight both of the unstuffed and of the stuffed bird . . . "[17] The court below also assumed that the courts of New York would sustain this interpretation because of the lack of statutory definition of "net weight". Thus, the interest of New York sought to be protected here rests upon an interpretation given in testimony by the Director of the Bureau of Weights and Measures. An examination of the New York statute and regulations casts doubt as to the correctness of this interpretation which brings the New York statute into conflict with the Federal law and regulations. The New York statute, section 193, subd. 3 of the Agricultural and Markets Law, provides:

> "All food and food products offered for sale at retail *and not in containers* shall be sold or offered for sale by net weight, standard measure or numerical count

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[16] 7 CFR, Sec. 81.134(a) of the Regulations.

[17] 230 F. Supp. at p. 401.

under such regulations as may be prescribed by the Commissioner." (Italics added.)

Nothing in the decision of the court below explains how the New York statute, which by its terms applies only to food products "not in containers" and which appears to be confined to providing the measure which must be used in determining the quantity of such products when sold or offered for sale at retail, authorizes the imposition of a requirement of multiple weight labeling on combination food products which are packaged in containers.[18]

Moreover, the New York regulation referred to by the court below expands on the statute since the restrictive language of the statute "and not in containers" does not appear in the regulation.

The definition of "food" and "food products" used in section 193 of the New York law includes "all material, solid, liquid or mixed, whether single or compound", and would clearly permit application of the net weight requirement to the compound, namely the "stuffed turkey".

That the suppression of the New York law and regulations as interpreted by the Director of the Bureau of Weights and Measures would have but slight effect on any legitimate interest of New York is evidenced by the testimony of John Madden, Director of Weights and Measures of the State of New York, who stated that the law was impractical from the standpoint of enforcement with respect to stuffed turkeys, and virtually impossible of enforcement with respect to other meat, poultry and seafood combinations.[19]

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[18] The federally labeled consumer package is a "container" under Section 4(p) of the Poultry Products Inspection Act.

[19] R. pp. 232-234.

The consequences of the decision of the District Court are far reaching and much broader than the issue of labeling stuffed turkey products involved in this case. There are a great number of convenience poultry food products now on the market which are combination or formula products consisting of poultry meat and other ingredients and new ones are being constantly developed.[20] Under the Federal Act and regulations, the Secretary has occasion to consider thousands of labels each year.[20] He must be satisfied that they are truthful, accurate and not false or misleading in any particular. To carry out this responsibility he must know all about the product, its ingredients, and its formula so as to be able to ascertain whether in the processing operation the proper ingredients are used and whether the formula is being followed.[21] Advance label approval is the only practical and effective way for the industry to operate and for the Secretary to carry out his responsibility. A separate statement of the net weight of the components of all the various poultry food products such as TV dinners, Fricassee, Chow Mein, A-La-King, stuffed turkey and the many fabricated poultry products[22] would impose great burdens on the industry and on the Secretary of Agriculture. Whatever goes on the label must be precise, accurate and capable of enforcement. Under modern commercial food technology it is not always possible to determine accurately the weight of a component or ingredient of a poultry product after the preparation of the total product has been completed, because of varying losses in weight in the cooking processes, variations due to moisture transference between ingredients, and other similar causes. Although, it may appear possible in the case of stuffed turkeys and some of the other convenience poultry food products for procedures to be developed which would permit the weight of particular components or ingredients to be ascertained at the time of processing, it would be impracticable if not impossible to develop procedures to so ascertain after the poultry product has been fabricated. It would not be possible, for example, to obtain separate weight criteria in the case of products such as poultry soups, stews, creamed poultry, a-la-kings, and similar products which are produced by batch lot in which the meat portion is determined and regulated by approved formulas and through controlled processing procedures which assure a proper distribution throughout the batch. In fabricating products of this type there necessarily is variation in ingredient content between individual containers. Such variations, however, are not considered significant in good commercial practices and if, as the New York statute requires, the containers are to be required to be labeled to show the specific weight for any particular variable component or ingredient the label cannot but be misleading or deceptive to the consumer.

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[20] See letter and attachment from United States Department of Agriculture, Appendix D, p. 37a.

[21] 7 CFR, Sec. 81.132 of the Regulations.

[22] 7 CFR, Sec. 81.134 of the Regulations.

The realities of modern food technology demonstrate the wisdom of the Congress in the Poultry Products Inspection Act in establishing a comprehensive and exclusive inspection and labeling program which permits experts within the Federal Government to exercise reason and judgment in determining the net weight criteria to be used so that there can be effective enforcement.

The labeling of combination food products with the total net weight of the combination in the manner provided by the Poultry Products Inspection Act is the same procedure recommended by the National Conference on Weights and Measures[23] in section 32 of its Model State Law on Weights and Measures.[24] This section, representing the consensus of weights and measures officials throughout the country, in essence, recognizes that the only practical means of enforcement of reasonable weights and measures protection for the consumer is a single net weight statement on combination foods.

If the District Court's ruling is permitted to stand and the several States and subdivisions thereof, as the decision implies, are free to require on federally inspected poultry products additional labeling information not approved by the Secretary of Agriculture under the Poultry Products Inspection Act, the poultry industry will be subjected to an intolerable burden. At present, all combination poultry products, including stuffed turkeys, may be sold everywhere in the United States, except the State of New York, with federally approved weight labels. Even in New York, combinations other than stuffed poultry may be sold under the federal label by virtue of that State's enforcement policy. However, it is appropriate to infer from the testimony of Mr. Madden, the New York Director of Weights and Measures that if the decision in this case remains unchanged, that policy will no longer stand.[25]

Under the District Court's opinion neither the Secretary of Agriculture nor the industry can be sure just to what extent the labeling of federally inspected poultry products is subject to State control. Up to the time of this decision by the District Court in this case there seemed to be no question that the Secretary of Agriculture has complete control over the entire labeling of federally inspected poultry and poultry products. The doubt and confusion arising from the decision of the court below, if it is not reversed, will result in chaos in the labeling of poultry products and such chaos will frustrate and thwart the Congressional policy and impose most serious burdens on interstate commerce.

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[23] The National Conference on Weights and Measures is sponsored by the National Bureau of Standards, U. S. Department of Commerce in implementation of its statutory responsibility for "cooperation with the States in securing uniformity in weights and measures laws and methods of inspection" (31 Stat. 1449; 15 USCA 272).

[24] Appendix B, p. 15a.

[25] R. p. 234.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

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APPENDIX A

The Poultry Products Inspection Act

Public Law 85-172

85th Congress, S. 1747

August 28, 1957

AN ACT

—71 Stat. 441—

To provide for the compulsory inspection by the
United States Department of Agriculture
of poultry and poultry products.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act [Poultry Products Inspection Act] may be cited as the "Poultry Products Inspection Act".

Legislative Finding

Sec. 2. Wholesome poultry products are an important source of the Nation's total supply of food. Such products are consumed throughout the Nation and substantial quantities thereof move in interstate and foreign commerce. Unwholesome and adulterated poultry products in the channels of interstate or foreign commerce, are injurious to the public welfare, adversely affect the marketing of wholesome poultry products, result in sundry losses to producers, and destroy markets for wholesome poultry products. The marketing of wholesome poultry products is affected with the public interest and directly affects the welfare of the people. All poultry and poultry products which have or are required to have inspection under this Act are either in the current of interstate or foreign commerce or directly affect such commerce. That part that enters directly into the current of interstate or foreign commerce cannot be effectively inspected and regulated without also inspecting and regulating all poultry and poultry products processed or handled in the same establishment.

The great volume of poultry products required as an article of food for the inhabitants of large centers of population may directly affect the movement of poultry and poultry products in interstate commerce. To protect interstate commerce in poultry and poultry products inspected for wholesomeness, from being adversely burdened, obstructed, or affected by uninspected poultry or poultry products, major consuming areas where poultry or poultry products are handled or consumed in such volume as to affect the movement of inspected poultry or poultry products in interstate commerce should be designated by the Secretary pursuant to the provisions of this Act.

DECLARATION OF POLICY

SEC. 3. It is hereby declared to be the policy of Congress to provide for the inspection of poultry and poultry products by the inspection service as herein provided to prevent the movement in interstate or foreign commerce or in a designated major consuming area of poultry products which are unwholesome, adulterated, or otherwise unfit for human food.

DEFINITIONS

SEC. 4. For purposes of this Act—

(a) The term "commerce" means commerce between any State or the District of Columbia, and any place outside thereof; or between points within the same State or the District of Columbia, but through any place outside thereof; or within the District of Columbia; and the term "State" includes the Commonwealth of Puerto Rico and the Virgin Islands.

(b) The term "Secretary" means the Secretary of Agriculture.

(c) The term "person" means any individual, partnership, corporation, association, or any other business unit.

(d) The term "poultry" means any live or slaughtered domesticated bird.

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(e) The term "poultry product" means any poultry which has been slaughtered for human food from which the blood, feathers, feet, head, and viscera have been removed in accordance with rules and regulations promulgated by the Secretary, any edible part of poultry, or, unless exempted by the Secretary, any human food product consisting of any edible part of poultry separately or in combination with other ingredients.

(f) The term "wholesome" means sound, healthful, clean, and otherwise fit for human food.

(g) The term "unwholesome" means:

(1) Unsound, injurious to health, or otherwise rendered unfit for human food.

(2) Consisting in whole or in part of any filthy, putrid, or decomposed substance.

(3) Processed, prepared, packed, or held under unsanitary conditions whereby a poultry carcass or parts thereof

or any poultry product may have become contaminated with filth or whereby a poultry product may have been rendered injurious to health.

(4) Produced in whole or in part from poultry which has died otherwise than by slaughter.

(5) Packaged in a container composed of any poisonous or deleterious substance which may render the contents injurious to health.

(h) The term "adulterated" shall apply to poultry and poultry products under one or more of the following circumstances:

(1) If they bear or contain any poisonous or deleterious substance which may render them injurious to health; but, in case the substance is not an added substance, such poultry and poultry products shall not be considered adulterated under this clause if the quantity of such substance in such poultry and poultry products does not ordinarily render them injurious to health.

(2) If they bear or contain any added poisonous or added deleterious substance, unless such substance is permitted in their production or unavoidable under good manufacturing practices as may be determined by rules and regulations hereunder prescribed by the Secretary or other provisions of Federal law limiting or tolerating the quantity of such added substance on or in such poultry and poultry products: *Provided,* That any quantity of such added substance exceeding the limits so fixed shall also be deemed to constitute adulteration.

(3) If any substance has been substituted, wholly or in part, therefor.

(4) If damage or inferiority has been concealed in any manner.

(5) If any valuable constituent has been in whole or in part omitted or abstracted therefrom.

(6) If any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

(i) The term "inspector" means: (1) an employee or official of the United States Government authorized by the Secretary to inspect poultry and poultry products under the authority of this Act, or (2) any employee or official of any State government authorized by the Secretary to inspect poultry and poultry products under authority of this Act, under an agreement entered into between the Secretary and the appropriate State agency.

(j) The term "official inspection mark" means the symbol, formulated pursuant to rules and regulations prescribed by the Secretary, stating that the product was inspected.

(k) The term "inspection service" means the official Government service within the Department of Agriculture

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designated by the Secretary as having the responsibility for carrying out the provisions of this Act.

(l) The terms "container" or "package" include any box, can, tin, cloth, plastic, or any other receptacle, wrapper, or cover.

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(m) The term "official establishment" means any establishment as determined by the Secretary at which inspection of the slaughter of poultry, or the processing of poultry products, is maintained under the authority of this Act.

(n) The term "label" means any written, printed, or graphic material upon the shipping container, if any, or upon the immediate container, including but not limited to an individual consumer package, of the poultry product, or accompanying such product.

(o) The term "shipping container" means any container used or intended for use in packaging the product packed in an immediate container.

(p) The term "immediate container" includes any consumer package; or any other container in which poultry carcasses or poultry products, not consumer packaged, are packed.

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SANITATION, FACILITIES, AND PRACTICES

SEC. 7. (a) Each official establishment slaughtering poultry or processing poultry products for commerce or in or for marketing in a designated major consuming area shall have such premises, facilities, and equipment, and be operated in accordance with such sanitary practices, as are required by regulations promulgated by the Secretary for the purpose of preventing the entry into or flow or movement in commerce or in a designated major consuming area, of poultry products which are unwholesome or adulterated.

(b) The Secretary shall refuse to render inspection to any establishment whose premises, facilities, or equipment, or the operation thereof, fail to meet the requirements of this section.

LABELING

SEC. 8. (a) Each shipping container of any poultry product inspected under the authority of this Act and found to be wholesome and not adulterated, shall at the time such product leaves the official establishment bear, in distinctly legible form, the official inspection mark and the approved plant number of the official establishment in which the contents were processed. Each immediate container of any poultry product inspected under the authority of this Act and found to be wholesome and not adulterated shall at the time such product leaves the official establishment bear, in addition to the official inspection mark, in distinctly legible form, the name of the product, a statement of ingredients if fabricated from two or more ingredients including a declaration as to artificial flavors, colors, or preservatives, if any, the net weight or other appropriate measure of the contents, the name and address of the processor and the approved plant number of the official establishment in which the contents were processed. The name and address of the distributor may be used in lieu of the name and address of the processor if the approved plant number is used to identify the official establishment in which the poultry product was prepared and packed. The Secretary may permit reasonable variations and grant exemptions from the foregoing labeling requirements in any manner not in conflict with the purposes of this Act.

(b) The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this Act or the container thereof which is false or misleading in any particular is prohibited. No poultry products inspected or required to be inspected pursuant to the provisions of this Act shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but established trade name or names which are

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usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Secretary, he may request a hearing, but the use of the label shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless within thirty days after the receipt of notice of such final determination the person adversely affected thereby appeals to the United States court of appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 204 of the Packers and Stockyards Act of 1921 [42 Stat. 162], as amended [7 U. S. C. 194], shall be applicable to appeals taken under this section.

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PROHIBITED ACTS

SEC. 9. The following acts or the causing thereof are hereby prohibited:

(a) The processing, sale or offering for sale, transportation, or delivery or receiving for transportation, in commerce or in a designated major consuming area of any poultry product, unless such poultry product has been inspected for wholesomeness and unless the shipping container, if any, and the immediate container are marked in accordance with the provisions of this Act.

(b) The sale or other disposition for human food of any poultry or poultry product which has been inspected and declared to be unwholesome or adulterated under this Act.

(c) Falsely making or issuing, altering, forging, simulating, or counterfeiting any official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, used in connection with the inspection of poultry or poultry products under this Act, or causing, procuring, aiding, assisting in, or being a party to, such false making, issuing, altering, forging, simulating, or counterfeiting, or knowingly possessing, without promptly notifying the Secretary of Agriculture or his representative, uttering, publishing, or using as true, or causing to be uttered, published, or used as true, any such falsely made or issued, altered, forged, simulated, or counterfeited official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, or representing that any poultry or poultry product has been officially inspected under the authority of this Act when such poultry or poultry product has in fact not been so inspected.

(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product.

(e) The use of any container bearing an official inspection mark except for the poultry product in the original form in which it was inspected and covered by said mark unless the mark is removed, obliterated, or otherwise destroyed.

(f) The refusal to permit access by any duly authorized representative of the Secretary, at all reasonable times, to the premises of an establishment engaged in processing poultry or poultry products for commerce, or in or for marketing in a designated major consuming area, upon presentation of appropriate credentials.

(g) The refusal to permit access to and the copying of any record as authorized by section 11 of this Act.

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(h) The using by any person to his own advantage, or revealing, other than to the authorized representatives of the Government in their official capacity, or to the courts when relevant in any judicial proceeding under this Act, any information acquired under the authority of this Act, concerning any matter which as a trade secret is entitled to protection.

(i) Delivering, receiving, transporting, selling, or offering for sale or transport for human consumption any slaughtered poultry or any part thereof, separately or in combination with other ingredients (other than poultry products as defined in this Act), in commerce or from an official establishment or in a designated major consuming area, except as may be authorized by and pursuant to rules and regulations prescribed by the Secretary.

COMPLETE COVERAGE OF OFFICIAL ESTABLISHMENTS

SEC. 10. No establishment processing poultry or poultry products for commerce or in or for marketing in a designated major consuming area shall process any poultry or poultry product except in compliance with the requirements of this Act.

RECORDS OF INTERSTATE SHIPMENT

SEC. 11. For the purpose of enforcing the provisions of this Act, persons engaged in the business of processing, transporting, shipping, or receiving poultry slaughtered for human consumption or poultry products in commerce or in a designated major consuming area, or holding such products so received shall maintain records showing, to the extent that they are concerned therewith, the receipt, delivery, sale, movement, or disposition of poultry and poultry products and shall, upon the request of a duly authorized representative of the Secretary, permit him at reasonable times to have access to and to copy all such records. Any record required to be maintained by this section shall be maintained for a period of two years after the transaction, which is the subject of such record, has taken place.

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PENALTIES

SEC. 12. (a) Any person who violates the provisions of section 9, 10, 11, or 17, shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than six months, or a fine of not more than $3,000, or both such imprisonment and fine; but if such violation is committed after one conviction of such person under this section has become final such person shall be subject to imprisonment for not more than one year, or a fine of not more than $5,000, or both such imprisonment and fine; but if such violation is committed after two or more convictions of such person under this section have become final such person shall be subject to imprisonment for not more than two years, or a fine of not more than $10,000, or both such imprisonment and fine. When construing or enforcing the provisions of said sections the act, omission, or failure of any person acting for or employed by any individual, partnership, corporation, or association within the scope of his employment or office shall in every case be deemed the act, omission, or failure of such individual, partnership, corporation, or association, as well as of such person.

(b) No carrier shall be subject to the penalties of this Act, other than the penalties for violation of section 11, by reason of his receipt, carriage, holding, or delivery, in the usual course of business, as a carrier, of slaughtered poultry or poultry products, owned by another person unless the carrier has knowledge, or is in possession of facts which

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would cause a reasonable person to believe that such slaughtered poultry or poultry products were not inspected or marked in accordance with the provisions of this Act or were not otherwise eligible for transportation under this Act.

* * * * *

REGULATIONS

SEC. 14. The Secretary shall promulgate such rules and regulations as are necessary to carry out the provisions of this Act.

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—71 Stat. 448—

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GENERAL PROVISIONS

SEC. 18. (a) For the purpose of preventing and eliminating burdens on commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this Act shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act, as amended [21 U. S. C. 301], to the extent of the application or the extension thereto of the provisions of this Act.

(b) In carrying out the provisions of this Act, the Secretary may cooperate with other branches of Government and with State agencies and may conduct such examinations, investigations, and inspections as he determines practicable through any officer or employee of a State commissioned by the Secretary for such purpose.

The Poultry Products Inspection Act

COST OF INSPECTION

SEC. 19. The cost of inspection rendered under the requirements of this Act, shall be borne by the United States, except that the cost of overtime and holiday work performed in establishments subject to the provisions of this Act at such rates as the Secretary may determine shall be borne by such establishments. Sums received by the Secre-

—71 Stat. 449—

tary in reimbursement for sums paid out by him for such premium pay work shall be available without fiscal year limitation to carry out the purposes of this section.

* * * * *

SEPARABILITY OF PROVISIONS

SEC. 21. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

* * * * *

APPENDIX B

Model State Law on Weights and Measures

U. S. DEPARTMENT OF COMMERCE
NATIONAL BUREAU OF STANDARDS

MODEL STATE LAW ON WEIGHTS AND MEASURES

FORM 2

[Provides for a State Division of Weights and Measures and for county and city sealers of weights and measures.]

as adopted by

The National Conference on Weights and Measures

Amendments through 1965

The National Conference on Weights and Measures is sponsored by the National Bureau of Standards in partial implementation of its statutory responsibility for "cooperation with the States in securing uniformity in weights and measures laws and methods of inspection."

Model State Law on Weights and Measures

BE IT ENACTED BY THE LEGISLATURE OF THE
STATE OF ....

* * * * *

SEC. 32. MEAT, POULTRY, AND SEAFOOD.—Except for immediate consumption on the premises where sold, or as one of several elements comprising a ready-to-eat meal sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat products, poultry (whole or parts), and all seafood except shellfish, offered or exposed for sale, or sold, as food shall be offered or exposed for sale and sold by weight. When meat, poultry, or seafood is combined with or associated with some other food element or elements to form either a distinctive food product or a food combination, such food product or combination shall be offered or exposed for sale and sold by weight, and the quantity representation may be the total weight of the product or combination, and a quantity representation need not be made for each of the several elements of the product or combination.

APPENDIX C

Regulations Governing the Inspection of Poultry and Poultry Products

(7 C. F. R. Part 81)

LABELING

§81.125 *Containers of poultry required to be labeled.* Except as may be authorized by the Administrator with respect to shipment of products between official establishments, each shipping container and each immediate container of any product shall at the time it leaves the official establishment bear approved labels containing information in accordance with the provisions set forth in §§81.126 to 81.146, inclusive, and the act.

§81.126 *Preparation of marking devices bearing the official inspection mark without advance approval prohibited; exception.* Except for the purposes of preparing and submitting a sample or samples of marking devices, or imprints prepared therefrom, to the Administrator for approval, no person shall procure, make, or prepare, or cause to be procured, made, or prepared, any stencil, or other marking device bearing official identification or any abbreviation, copy or representation thereof, for use on any product without the written authority therefor of the Administrator. However, when any sample stencil, or other marking device or an imprint prepared therefrom is approved by the Administrator for a particular applicant, additional supplies of such stencil, or other marking device of a character identical to such approved sample may be procured, made, or prepared by such applicant, for use in accordance with the regulations, without further approval by the Administrator.

Regulations Governing the Inspection of Poultry and Poultry Products

§81.127 *Labels to be approved by the Administrator.* No label, except printer's proofs bearing official identification shall be printed until the printer's proof or a photostatic copy has been found by the Administrator to be acceptable; and no label or imprint bearing official identification shall be used until finished copies or samples thereof have been approved by the Administrator, except that approval may be given to printer's final proofs or photostatic copies of labels or samples of stenciled and rubber stamped imprints for shipping containers or containers for institutional packs, and no such labels or imprints shall be used until such proofs or copies have been approved by the Administrator.

* * * * *

§81.129 *Wording and form of the inspection mark.*

Except as otherwise authorized, the inspection mark required to be used with respect to inspected poultry products shall include wording as follows: "Inspected for wholesomeness by U.S. Department of Agriculture." This wording shall be contained within a circle. The form and arrangement of such wording shall be exactly as indicated in the example in Figure 1, except that the appropriate plant number shall be shown, and if the plant number appears elsewhere on the labeling material in the manner prescribed in §81.130(a)(6), it may be omitted from the inspection mark. The Administrator may approve the use of abbreviations of such inspection mark; and such approved abbreviations shall have the same force and effect as the inspection mark. The inspection mark, or the approved abbreviation thereof, shall be printed on consumer packages, or on a label to be securely affixed to such packages. The inspection mark, or approved abbreviation thereof, shall be applied to shipping containers and may be printed or stenciled thereon, but shall not be applied by rubber stamping.

[*Rubber stamp*—Inspected for Wholesomeness by U.S. Department of Agriculture—P-42—*Figure 1*]

§81.130 *Wording on labels.* (a) Each label approved for use on an immediate container for poultry products shall bear in distinctly legible form the following information:

(1) The common or usual name of the poultry product.

(2) A statement of ingredients if fabricated from two or more ingredients, including a declaration as to artificial flavors, colors, or preservatives, if any. Such ingredients shall be listed by their common or usual names in the order of their descending proportions. For the purpose of this paragraph, the term "chicken meat," unless modified by an appropriate adjective, is construed to mean deboned white and dark meat; whereas, the term "chicken" may include other edible parts such as skin and fat not in excess of their natural proportions, in addition to the chicken meat. If the term "chicken meat" is listed and the product also contains skin, giblets, or fat, it is necessary to list each such ingredient. This terminology shall apply to poultry products prepared from other kinds of poultry where applicable.

(3) The net weight or other appropriate measure of the contents, except that the Administrator may approve the use of labels for certain types of immediate containers which do not bear the net weight: *Provided,* That the retailer or distributor supplying the retailer agrees in writing to the

Administrator to mark the true net weight on the label prior to display and sale thereof: *And provided further,* That the shipping container bears a statement "Net weight to be marked on consumer packages prior to display and sale": *And provided further,* That the total net weight of the contents of the shipping container shall be marked on such container. The net weight marked on containers of poultry products shall be the net weight of the poultry products and shall not include the weights of the wet or dry packaging materials and giblet wrapping materials.

(4) The name and address of the packer or distributor and when the name of the distributor is shown, it shall be qualified by such term as "packed for," "distributed by," or "distributors."

(5) The official inspection mark.

(6) The plant number of the official establishment in which the product was inspected, either within the official inspection mark or clearly visible and in close proximity elsewhere on the exterior of the container, or in the case of canned product, the plant number may be embossed on the lid of each can. In the case of nontransparent consumer packages such as cartons, the plant number may be legibly printed thereon or it may be shown on an insert label placed on top of the product within the package. In the case of transparent wrappers, the plant number may be shown on an insert label and so placed under the transparent covering that it will be clearly visible and legible.

(b) Each label approved for use on a shipping container shall bear in distinctly legible form the following information:

Regulations Governing the Inspection of Poultry and Poultry Products

(1) The official inspection mark.

(2) The plant number of the official establishment in which the product was inspected, either within the official inspection mark, or elsewhere on the container clearly visible and in close proximity to the official inspection mark.

(c) Any label which bears the official inspection mark or any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of the regulations shall not bear any statement that is false or misleading. If the Administrator has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Administrator may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Administrator, he may request a hearing, but the use of the label shall, if the Administrator so directs, be withheld pending hearing and final determination by the Administrator. Any person so denied the approval of any label shall be notified promptly of the reasons for the denial. A written application for a hearing with respect to the denial may be filed by said person with the Administrator within 10 days after notice of the denial. Such petition shall state specifically the errors alleged to have been made by the Administrator in denying approval of the label. After consideration of the facts adduced at the hearing, any determination with respect to the matter by the Administrator shall be conclusive unless, within 30 days after the receipt of notice of such final determination,

Regulations Governing the Inspection of
Poultry and Poultry Products

the person adversely affected thereby appeals to the United States Court of Appeals for the Circuit in which he has his principal place of business, or to the United States Court of Appeals for the District of Columbia Circuit. The provisions of section 204 of the Packers and Stockyards Act of 1921, as amended, shall be applicable to appeals taken under this section.

§81.131 *False or deceptive terms or devices; and other labeling requirements.* (a) No product, and no container thereof, shall be labeled with any false or deceptive name, but established trade names which are usual to such articles and are not false or deceptive and which have been approved by the Administrator may be used.

(b) No statement, word, picture, design, or device, which is false or misleading in any particular or conveys any false impression or gives any false indication of origin, identity, or quality, shall appear on any label. For example:

(1) Official grade designations such as the letter grades A, B, and C may be used in labeling individual carcasses of poultry and consumer packages of poultry and poultry products only if such poultry has been graded by a licensed grader of the Federal or Federal-State poultry grading service.

(2) Terms having geographical significance with reference to a particular locality may be used only when the product was produced in that locality.

(3) Terms, such as "baby," may be used to indicate immaturity of poultry which is marketed earlier than the

Regulations Governing the Inspection of Poultry and Poultry Products

usual marketing age: *Provided,* That such terms are printed in a style and size of type no larger than is used to indicate the name of the product.

(c) Poultry products which have been treated with compounds to retard spoilage shall be labeled to indicate such treatment.

(d) The terminology specified in subparagraphs (1) through (10) of this paragraph are applicable to parts of poultry cut in the manner described therein.

(1) "Breasts" shall be separated from the back at the shoulder joint and by a cut running backward and downward from that point along the junction of the vertebral and sternal ribs. The ribs may be removed from the breasts, and the breasts may be cut along the breast bone to make two approximately equal halves; or the wishbone portion, as described in subparagraph (3) of this paragraph, may be removed before cutting the remainder along the breast bone to make three parts. Peaces cut in this manner may be substituted for lighter or heavier pieces for exact weight-making purposes and the package may contain two or more of such parts without affecting the appropriateness of the labeling as "chicken breasts." Neck skin shall not be included with the breasts.

(2) *Breasts with ribs* shall be separated from the back at the junction of the vertebral ribs and back. Breasts with ribs may be cut along the breast bone to make two approximately equal halves; or the wishbone portion, as described in subparagraph (3) of this paragraph, may be removed before cutting the remainder along the breast bone to make

three parts. Pieces cut in this manner may be substituted for lighter or heavier pieces for exact weight-making purposes and the package may contain two or more of such parts without affecting the appropriateness of the labeling as "breasts with ribs." Neck skin shall not be included.

(3) "Wishbones" (Pulley Bones), with covering muscle and skin tissue, shall be severed from the breast approximately halfway between the end of the wishbone (hypocledium) and front point of the breast bone (cranial process of the sternal crest) to a point where the wishbone joins the shoulder. Neck skin shall not be included with the wishbone.

(4) "Drumsticks" shall be separated from the thigh by a cut through the knee joint (femorotibial and patellar joint) and from the hock joint (tarsal joint).

(5) "Thighs" shall be disjointed at the hip joint and may include the pelvic meat, but shall not include the pelvic bones. Back skin shall not be included.

(6) "Legs" shall include the whole leg, i.e., the thigh and the drumstick, whether jointed or disjointed. Back skin shall not be included.

(7) "Wings" shall include the entire wing with all muscle and skin tissue intact, except that the wing tip may be removed.

(8) "Backs" shall include the pelvic bones and all the vertebrae posterior to the shoulder joint. The meat shall not be peeled from the pelvic bones. The vertebral ribs and/or scapula may be removed or included without affecting the appropriateness of the title. Skin shall be substantially intact.

Regulations Governing the Inspection of Poultry and Poultry Products

(9) "Stripped backs" shall include the vertebrae from the shoulder joint to the tail, and include the pelvic bones. The meat may be stripped off of the pelvic bones.

(10) "Necks", with or without neck skin, shall be separated from the carcass at the shoulder joint.

(11) Parts of poultry may be cut in any manner the processor desires as long as the labeling appropriately reflects the contents of the container of such poultry.

(e) The name of the product required to be shown on labels for fresh or frozen raw whole carcasses of poultry shall be in either of the following forms: The name of the kind (such as chicken, turkey, or duck) preceded by the qualifying term "young" or "mature" or "old", whichever is appropriate; or the appropriate class name as described in paragraph (f) of this section. The name of the kind may be used in addition to the class name, but the name of the kind alone without the qualifying age or class term is not acceptable as the name of the product. The class name may be appropriately modified by changing the word form such as using the term "roasting chicken", rather than "roaster". The name "chicken" may be used without qualification with respect to a ready-to-cook pack of fresh or frozen cut-up young chickens, or a half of a young chicken, and the name "duckling" may be used without qualification with respect to a ready-to-cook pack of fresh or frozen young ducks. The appropriate names for cut-up parts are set forth in paragraph (d) of this section. When naming parts cut from young poultry, the identity of both the kind of poultry and the name of the part shall be included in the product name. The product name for parts or portions cut from mature poultry shall include, along with the part or portion name, the class name or the qualifying term "mature". The name of the product for cooked or heat processed poultry products shall include the kind name of the poultry from which the product was prepared.

(f) The appropriate class names for the various kinds of poultry are as follows:

(1) *Chickens*—(i) *Rock Cornish game hen or Cornish game hen.* A Rock Cornish game hen or Cornish game hen is a young immature chicken (usually 5 to 6 weeks of age) weighing not more than 2 pounds ready-to-cook weight, which was prepared from a Cornish chicken or the progeny of a Cornish chicken crossed with another breed of chicken.

(ii) *Broiler or fryer.* A broiler or fryer is a young chicken (usually 9 to 12 weeks of age), of either sex, that is tender-mated with soft, pliable, smooth-textured skin and flexible breastbone cartilage.

(iii) *Roaster.* A roaster is a young chicken (usually 3 to 5 months of age), of either sex, that is tender-meated with soft, pliable, smooth-textured skin and breastbone cartilage that may be somewhat less flexible than that of a broiler or fryer.

(iv) *Capon.* A capon is a surgically unsexed male chicken (usually under 8 months of age) that is tender-meated with soft, pliable, smooth-textured skin.

(vi) *Stag.* A stag is a male chicken (usually under 10 months of age) with coarse skin, somewhat toughened and darkened flesh, and considerable hardening of the breastbone cartilage. Stags show a condition of fleshing and a degree of maturity intermediate between that of a roaster and a cock or old rooster.

(vii) *Hen or stewing chicken or fowl.* A hen or stewing chicken or fowl is a mature female chicken (usually more than 10 months of age) with meat less tender than that of a roaster, and nonflexible breastbone tip.

(viii) *Cock or rooster.* A cock or rooster is a mature male chicken with coarse skin, toughened and darkened meat, and hardened breastbone tip.

(2) *Turkeys*—(i) Fryer-roaster turkey. A fryer-roaster turkey is a young immature turkey (usually under 16 weeks of age), of either sex, that is tender-meated with soft, pliable, smooth-textured skin, and flexible breastbone cartilage.

(ii) *Young hen turkey.* A young hen turkey is a young female turkey (usually 5 to 7 months of age) that is tender-meated with soft, pliable, smooth-textured skin, and breastbone cartilage that is somewhat less flexible than in a fryer-roaster turkey.

(iii) *Young tom turkey.* A young tom turkey is a young male turkey (usually 5 to 7 months of age), that is tender-meated with soft, pliable, smooth-textured skin and breastbone cartilage that is somewhat less flexible than in a fryer-roaster turkey.

(iv) *Yearling hen turkey.* A yearling hen turkey is a fully matured female turkey (usually under 15 months of age) that is reasonably tender-meated and with reasonably smooth-textured skin.

Regulations Governing the Inspection of Poultry and Poultry Products

(v) *Yearling tom turkey.* A yearling tom turkey is a fully matured male turkey (usually under 15 months of age) that is reasonably tender-meated and with reasonably smooth-textured skin.

(vi) *Mature turkey or old turkey (hen or tom).* A mature or old turkey is an old turkey of either sex (usually in excess of 15 months of age) with coarse skin and toughened flesh.

(3) *Ducks*—(i) *Broiler duckling or fryer duckling.* A broiler duckling or fryer duckling is a young duck (usually under 8 weeks of age), of either sex, that is tender-meated and has a soft bill and soft windpipe.

(ii) *Roaster duckling.* A roaster duckling is a young duck (usually under 16 weeks of age), of either sex, that is tender-meated and has a bill that is not completely hardened and a windpipe that is easily dented.

(iii) *Mature duck or old duck.* A mature duck or an old duck is a duck (usually over 6 months of age), of either sex, with toughened flesh, hardened bill, and hardened windpipe.

(4) *Geese*—(i) *Young goose.* A young goose may be of either sex, is tender-meated, and has a windpipe that is easily dented.

(ii) *Mature goose or old goose.* A mature goose or old goose may be of either sex and has toughened flesh and hardened windpipe.

(5) *Guineas*—(i) *Young guinea.* A young guinea may be of either sex, is tender-meated, and has a flexible breastbone cartilage.

Regulations Governing the Inspection of Poultry and Poultry Products

(ii) *Mature guinea or old guinea.* A mature guinea or an old guinea may be of either sex, has toughened flesh, and a hardened breastbone.

§81.132. *Formulas required.* Copies of each label submitted for approval shall, when the Administrator requires, be accompanied by a statement showing the kinds and percentages of the ingredients by their common or usual names comprising the poultry product and by a statement indicating the method of preparation of the product with respect to which the label is to be used. Approximate percentages may be given in cases where the percentages of ingredients may vary from time to time, if the limits of variation are stated.

§81.134 *Product specifications for labeling purposes.*

(a) *Authorization to establish specifications.* The Administrator is authorized to establish specifications covering the principal constituents of any poultry food product with respect to which a specified name of the product or other labeling terminology may be used, whenever such action is necessary to prevent sale of the product under a false or deceptive name or other false or misleading labeling. The requirements of this section are hereby found to be necessary for this purpose.

(b) *Labeling terminology for light and dark chicken or turkey meat.* Product containing light and dark chicken or turkey meat in quantities other than natural proportions, as indicated in Table I, must have a qualifying statement in close conjunction with the name of the product indicating, as shown in Table I of this paragraph, the types of meat actually used, except that when the product contains less than 10 percent cooked deboned poultry meat or is processed in a manner that the character of the light and dark meat is not distinguishable, the qualifying statement will not be required. The qualifying statement must be in type at least one-half the size and of equal boldness as the name of the product; e.g., Boned Turkey (Dark Meat). If a product contains light and dark meat in natural proportions and bears a label referring to light or dark meat content, the label shall include a qualifying statement in accordance with this paragraph.

TABLE I

Terminology	Percent light meat	Percent dark meat
Natural proportions	50-65	50-35.
Light or white meat	100	0.
Dark meat	0	100.
Light and dark meat	51-65	49-35.
Dark and light meat	35-49	65-51
Mostly white meat	66 or more	34 or less.
Mostly dark meat	34 or less	66 or more.

(c) *Poultry meat content of poultry food products*—(1) *General.* (i) Where cooked poultry meat is specified in this section as an ingredient of poultry food products, this means poultry meat derived from poultry processed, cooked and cooled in a manner approved by the Administrator without use of a liquid or moisture in direct contact with the poultry meat following the cooking and cooling of the poultry.

(ii) If, following cooking and cooling of poultry meat to be used in poultry food products, liquid or moisture is used in direct contact with such poultry meat and the percentage of solids, excluding salt, in the poultry meat is found to be below 34 percent when such poultry meat is tested by approved methods, the percentage of poultry meat required by this section for any poultry food product shall be increased in proportion to the deficiency, or the meat shall be so processed as to raise the solids content, excluding salt, to 34 percent. The official plant shall furnish adequate facilities for such testing.

(2) *Canned boned poultry.* (i) Canned boned poultry shall, unless otherwise specified in this subparagraph (2), be prepared from cooked deboned poultry meat and may contain skin and fat not in excess of natural proportions. Gelatin, stabilizers or similar solidifying or emulsifying agents shall not be added to product labeled "Boned (Kind)—Solid Pack," but may be added in quantities not in excess of a total of 0.5 percent of the total ingredients in the preparation of other canned boned poultry products and in such case the common name of the substance added shall be included in the name of the product, e.g., "Boned Chicken with Broth—Gelatin Added."

(ii) Canned boned poultry, except poultry within subdivision (iv) of this subparagraph, shall meet the requirements set forth in Table II of this paragraph. The percentages in Table II shall be calculated on the basis of the total ingredients used in the preparation of the product.

(iii) Canned shredded poultry (Shredded (Kind)) consists of poultry meat from the back, wings, and neck, separately or in combination, and shall be prepared as set forth in Table II, item 1, 2, 3 or 4, whichever is applicable. In addition, poultry meat from other parts may be used. Skin and fat not in excess of natural proportions of the parts used may be included.

(iv) Canned boned poultry with natural juices (Boned (Kind) with natural juices) shall be prepared from either raw boned poultry meat or a mixture of raw boned poultry meat and cooked boned poultry meat, and shall have no liquid added during the preparation of the product.

TABLE II

Product name	Minimum percent cooked deboned poultry meat of kind indicated, with skin, fat, and seasoning	Maximum percent liquid that may be added[1]
1. Boned (Kind)—Solid Pack	95	5
2. Boned (Kind)	90	10
3. Boned (Kind) with Broth[2]	80	20
4. Boned (Kind) with percent Broth[2][3]	50	50
5. Strained or Chopped (Kind) with Broth[2][4]	43	57

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[1] Liquid may be in the form of, but is not limited to, broth or extractives.

[2] Alternatively, product may be prepared from raw boned poultry meat in combination with cooked boned poultry meat so long as the product complies with the specified standard.

[3] Total amount of liquid added shall be included in the name of the product; e.g., "Boned Chicken with 25 percent Broth."

[4] Label must indicate in some manner that product is for infant or geriatric servings.

Regulations Governing the Inspection of Poultry and Poultry Products

(3) *Poultry dinners (frozen) and pies.* Poultry dinners (frozen) and pies shall meet the requirements set forth in Table III of this paragraph and the percentage or weight shall be calculated on the basis of total ingredients used in the preparation of the products.

TABLE III

	Minimum cooked deboned poultry meat of kind indicated		Minimum raw deboned poultry meat of kind indicated	
Product name	Percent	Weight	Percent	Weight
(Kind) Pies	14 or	1⅛ oz. per 8-oz. pie or	25 or	2 oz. per 8-oz. pie
(Kind) Dinners	[1] [2] 18	[2] 2 oz.		

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[1] Excluding weight of appetizers, desserts, etc.

[2] 18 percent or 2 ounces, whichever is greater. A minimum of 45 percent, or 5 ounces per dinner, whichever is greater, of cooked poultry including bone and breading may be used in lieu of minimum 18 percent or 2 ounces of cooked deboned poultry meat and the cooked poultry including bone and breading shall not contain more than 30 percent breading.

(4) *Poultry rolls.* (i) Binding agents, including but not limited to gelatin and wheat gluten, may be added in quantities not in excess of a total of 3 percent for cooked rolls and 2 percent for raw rolls, based on the total ingredients used in the preparation of the product, without affecting the name of the product. However, when such agents are added in excess of 3 percent or 2 percent, whichever is applicable, the common name of the agent or the term "Binders Added" shall be included in the name of the product; e.g., "Turkey Roll—Gelatin Added."

(ii) With respect to heat processed rolls, 2 percent or less liquid based on the weight of the finished product without liquid may remain with or be returned to product labeled as "(Kind) Roll."

(iii) Heat processed rolls which have more than 2 percent liquid remaining with or returned to the product shall be labeled as "(Kind) Roll with Natural Juices." If any liquid other than natural cookout juices is added, the product must be labeled to indicate that fact; e.g., "Turkey Roll with Broth." Liquid shall not be returned or added to product within this subdivision (iii) in excess of the amount normally cooked out during preparation.

(5) *(Kind)—burgers.* Such product shall consist of 100 percent poultry meat of the kind indicated, with skin and fat not in excess of natural proportions. Product containing fillers or binders shall be named "(Kind) Patties."

(6) *Other poultry dishes and specialty items.* (i) Poultry dishes and specialty items listed in Table IV of this paragraph shall meet the requirements set forth in said Table, irrespective of the type of packaging, and the percentages in Table IV shall be calculated on a ready-to-serve basis, except that soup bases in institutional packs which are prepared for sale to institutional users shall have a minimum of 15 percent cooked deboned poultry meat based on the weight of the soup base product. Products similar to those listed in Table IV, but having less than the specified minimum poultry meat content, may use the "Kind" name in the product name, provided it is appropriately qualified to distinguish such products from those containing the specified minimum meat content.

Regulations Governing the Inspection of Poultry and Poultry Products

(ii) Products of the types specified in §§81.208 (a) and (b) will be deemed to have false, deceptive or misleading labeling if they use the "Kind" name of the poultry (chicken, turkey, etc.) in the product name without appropriate qualification. For example, a consumer packaged noodle soup product containing less than 2 percent chicken meat on a ready-to-serve basis may not be labled as "Chicken Noodle Soup" but, when appropriate, could be labled as "Chicken Flavored Noodle Soup."

TABLE IV

Product name[1]	Minimum percent cooked deboned poultry meat of kind indicated	Minimum percent cooked poultry of kind indicated, including bone
(Kind) Ravioli	2	
(Kind) Soup	2	
Chop Suey with (Kind)	2	
(Kind) Chop Suey	4	
(Kind) Chow Mein without noodles	4	
(Kind) Tamales	6	
Noodles or Dumplings with (Kind)[2]	6	
(Kind) Stew	12	
(Kind) Fricassee of Wings		40
(Kind) Noodles or Dumplings[2]	15	30
Creamed (Kind)	20	
(Kind) Cacciatore	20	40
(Kind) Fricassee	20	40
(Kind) A-La-King	20	
Sliced (Kind) with Gravy	35	
Minced (Kind) Barbecue	40	

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[1] The product name may contain other appropriate descriptive terms such as "noodle"; e.g., "Chicken Noodle Soup".

[2] Product also includes rice or similar starches.

Regulation Governing the Inspection of Poultry and Poultry Products

§81.138. *Evidence of label approval.* No inspector shall authorize the use of official identification for any inspected product unless he has on file evidence that such official identification or packaging material bearing such official identification has been approved in accordance with the provisions of §81.127.

§81.141. *Affixing of official identification.* No official identification or any abbreviation, copy or representation thereof may be affixed to or placed on or caused to be affixed to or placed on any product or container thereof except by an inspector or under the supervision of an inspector or other person authorized by the Administrator. All such products shall have been inspected as required by the regulations in this part.

APPENDIX D

United States Department of Agriculture
Letter and Attachment

UNITED STATES DEPARTMENT OF AGRICULTURE
CONSUMER AND MARKETING SERVICE
WASHINGTON, D. C. 20250

August 19, 1965

Mr. Joseph Parker
Pace and Parker
Washington Building, Room 531
15th Street and New York Avenue, N.W.
Washington, D. C. 20005

Dear Mr. Parker:

This is in response to your written request concerning certain specific information about the labeling of poultry products. This Division receives about 14,000 applications for label approval each year. About 9,500 of these are approved; the remainder disapproved for various reasons. A large proportion of these labels are for poultry products containing poultry meat combined with other products to provide consumers with convenience food items.

Your second question concerned the number of different items and a listing of the types of composite foods being processed under the poultry inspection program. The attached listing may not be complete. However, it illustrates the types of product which are labeled and processed under the Poultry Products Inspection Act.

Sincerely yours,

/s/ HERMON I. MILLER
Hermon I. Miller
Director, Poultry Division

Attachment

United States Department of Agriculture Letter and Attachment

FORMULA PRODUCTS

Chicken noodle soup
Chicken rice soup
Chicken vegetable soup
Chicken gumbo soup
Cream of chicken soup
Kosher chicken soup
Miscellaneous chicken soup

Chicken soup base
Chicken noodle soup base
Chicken gravy base
Chicken rice soup base
Chicken gumbo soup base
Soup base with chicken fat
Soup base chicken flavored

Turkey soup base

Chicken broth
Chicken broth with rice
Chicken broth with noodles

Turkey broth

Turkey noodle soup
Turkey rice soup
Turkey vegetable soup
Turkey gumbo soup
Cream of turkey soup

Chicken bouillon
Chicken consomme

Turkey pie
Chicken pie

Chicken pie filling
Turkey pie filling

Chicken turnover
Turkey turnover

Fried chicken dinner
Creamed chicken dinner
Baked chicken dinner
Barbequed chicken dinner
Chicken and dumpling dinner

Sliced turkey dinner
Roast turkey dinner

Chicken 3 course dinner
Turkey 3 course dinner

Fried chicken with mashed potatoes
Sliced turkey with gravy
Sliced turkey with gravy and dressing
Sliced turkey with gravy and mashed potatoes

Breaded chicken croquette
Chicken croquette
Chicken loaf
Breaded chicken patties

United States Department of Agriculture Letter and Attachment

FORMULA PRODUCTS (Cont.)

Chicken patties
Breaded chicken wedges
Breaded turkey croquettes
Turkey croquettes
Turkey loaf
Breaded turkey patties
Turkey patties
Chicken hash
Turkey hash
Chicken salad
Turkey salad
Chicken sticks
Breaded turkey fillets
Turkey fillets
Turkey steak
Chicken steak

Chicken liver spread
Chicken pate
Chopped chicken liver salad
Smoked turkey pate
Chicken liver with vegetables

Chicken gravy
Chicken with vegetables and gravy
Turkey gravy
Chicken a la King
Turkey a la King
Creamed chicken
Creamed turkey
Chicken with sauce

Chicken fricassee
Turkey fricassee

Chicken and noodles
Noodles and chicken
Chicken and dumplings
Dumplings and chicken
Turkey and noodles
Noodles and turkey
Chicken and rice
Rice and chicken
Chicken spaghetti
Chicken ravioli
Turkey ravioli
Chicken casserole
Turkey casserole

Turkey roll
Chicken roll

Whole chicken
Stuffed whole chicken
Whole smoked chicken
Boned duckling
Stuffed Rock Cornish Game Hen
Smoked Rock Cornish Game Hen
Smoked whole turkey
Smoked pheasant
Precooked and breaded frying chicken parts

United States Department of Agriculture
Letter and Attachment

FORMULA PRODUCTS (Cont.)

Precooked and breaded stuffed frying chicken parts
Chicken roast
Turkey roast
Rendered chicken fat
Chicken scrapple

Cooked turkey giblets
Boned chicken
Shredded chicken
Shredded turkey
Boned turkey
Dehydrated chicken
Dehydrated turkey
Cooked chicken skin

Strained chicken baby food
Strained turkey baby food
Junior chicken baby food
Junior turkey baby food

Chicken hors d'oeuvres
Turkey hors d'oeuvres
Turkey luncheonmeat
Chicken lunchmeat

Chicken chow mein
Chow mein with chicken
Turkey chow mein
Chicken chop suey
Fried rice with chicken
Chicken barbeque
Turkey barbeque
Chicken cacciatori
Turkey cacciatori
Chicken tetrazzini
Turkey tetrazzini
Chicken tamales
Turkey tamales
Turkey sausage
Chicken sausage
Chicken stew
Chicken enchilades
Chicken a la Kiev
Turkey sandwich
Chicken sandwich
Chicken souffle

Chicken chilli
Turkey chilli
Chicken cracklings

APPENDIX E

Article I, Clause 3 and Article VI, Clause 2 of the Constitution of the United States

Art. I, Sec. 8, Clause 3

"The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

Art. VI, Clause 2

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

APPENDIX F

Agricultural and Markets Law of the State of New York

§193. *Method of sale of food and food products*

1. Definition of "food" and "food product". The terms "food" and "food product" as used in this section shall include all material, solid, liquid or mixed, whether simple or compound, used or intended for consumption by human beings or domestic animals normally kept as household pets and shall also include all substances or ingredients to be added thereto for any purpose.

2. All food and food products which are sold, offered or exposed for sale by wholesalers, packers, distributors or jobbers shall be sold or offered for sale by net weight, numerical count or standard measure, whichever term shall be applicable, and shall be plainly marked by such person or persons offering the food or food products for sale, in such form or manner as may be prescribed by the commissioner, except that it shall not be necessary to so mark meat, meat products or fish, except shellfish in natural form, provided the net weight be stated on a written invoice and on the shipping container of the meat, meat product or fish.

3. All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the commissioner.

4. All food and food products which are packaged or wrapped by the retailer in advance of being exposed or offered for sale by the retailer shall be accurately marked in such form or manner as may be prescribed by the commissioner, with (a) the net weight or standard measure

or numerical count; (b) the selling price per pound or unit of standard measure, and (c) the total selling price.

5. Wherever food or food products are packaged or wrapped for sale by a retailer in advance of being sold or offered for sale, an accurate computing scale shall be maintained so placed as to be easily available to customers.

6. This section shall not apply to sales of (a) eggs, fresh fruits, fresh vegetables, grains and nuts; (b) milk and cream as set forth in section one hundred ninety-one of this chapter; (c) malt beverages as set forth in section one hundred ninety-two-c of this chapter; (d) bread, as set forth in section one hundred ninety-three-a of this chapter; (e) frozen desserts as set forth in section one hundred ninety-three-d of this chapter; (f) alcoholic beverages; and (g) drugs and pharmaceuticals. Added L. 1962, c. 770, §2; amended L. 1963, c. 377, eff. April 16, 1963.

APPENDIX G

New York State Regulations

STATE OF NEW YORK

DEPARTMENT OF AGRICULTURE AND MARKETS

WEIGHTS AND MEASURES MANUAL—Circular 834

221.9. METHOD OF SALE OF SPECIFIC COMMODITIES

* * * * *

(c) *Meat, poultry and fish.* Except for immediate consumption on the premises where sold or as one of several elements comprising a ready-to-eat meal sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat food products, poultry (whole or parts) and all seafood except shellfish, offered or exposed for sale or sold, as food shall be offered or exposed for sale and sold by net weight. The meaning of the words meat and meat food products as used in this section is that defined in Section 96-g of the Agriculture and Markets Law.

* * * * *

221.40. MEAT, POULTRY AND FISH. Meat, poultry and fish shall be sold or offered for sale as food at retail by net weight only.

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103 Cong. Rec. 11,121-23

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 9

SWIFT & COMPANY, INC., AND ARMOUR AND CO.,
APPELLANTS

v.

DON J. WICKHAM, COMMISSIONER OF AGRICULTURE & MARKETS OF NEW YORK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the United States District Court for the Southern District of New York (R. 376) is reported at 230 F. Supp. 398.

JURISDICTION

The initial judgment of the three-judge district court was entered on June 12, 1964 (R. 396) and the amended judgment on July 17, 1964 (R. 397). The notice of appeal was filed on August 10, 1964 (R. 398). Appellants invoke the jurisdiction of this Court under 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether New York's requirements relating to the disclosure (labeling) of weights of retail foodstuffs are unconstitutional, either under the Commerce Clause or the Fourteenth Amendment, as applied to frozen stuffed turkeys offered by appellants for sale in that State.

2. Whether the Poultry Products Inspection Act, 21 U.S.C. 451, preempted the field, precluding the application of New York's weight-labeling requirements in respect of poultry inspected under that Act.

3. Whether the Poultry Products Inspection Act, as applied to frozen stuffed turkeys, is in conflict with the application of New York Agriculture and Markets Law, § 193.3.

STATUTES INVOLVED

The pertinent provisions of the Poultry Products Inspection Act, 21 U.S.C. 451 *et seq.*, and the New York Agriculture and Markets Law, § 193, are set forth in the appendix, *infra*, pp. 35 *et seq.*

STATEMENT

1. BACKGROUND

Appellants, Swift & Co. and Armour and Co., are well known meat packing companies with a nationwide business. Both companies prepare frozen stuffed turkeys at plants in Minnesota and Wisconsin and market the birds throughout the United States in frigid form. The problem presented in this case is whether the consumer is to be advised, before her purchase, precisely how much of this item is bird and how much bread. It is on this issue which the Department of Agriculture appears to differ from the State of New York.

Section 193.3 of the New York Agriculture and Markets Law provides that (emphasis added):

> All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by *net weight,* standard measure or numerical count under such regulations as may be prescribed by the commissioner.

New York State Commissioner of Agriculture and Markets Wickham has interpreted "net weight," as used in the New York statute, to require frozen stuffed turkeys offered for sale in New York to bear labels showing, separately, the weight of the turkey itself and of its stuffing, or at least giving the unstuffed weight of the bird along with the combined weight of the entire product (R. 238). Swift was convicted and fined in a court of that State for failing to comply, having offered frozen stuffed turkeys for sale in New York with labels bearing only the aggregate weight (R. 243–244). Swift did not appeal from that conviction.

The Poultry Products Inspection Act, 21 U.S.C. 451 *ff.*, requires poultry products shipped in interstate commerce to be inspected for wholesomeness by federal officials and to bear labels containing, *inter alia,* (§ 8(a) of the Act, 21 U.S.C. 457(a), emphasis added):

> [A] statement of ingredients if fabricated from two or more ingredients including a declaration as to artificial flavors, colors, or preservatives, if any, [and] the *net weight or other appropriate measure of the contents* * * *.

Under regulations of the Secretary of Agriculture, such labels must receive prior approval by designated officials in the Department of Agriculture before they may be used. 7 C.F.R. 81.126, 81.127. Swift and Armour submitted to the Department of Agriculture sample frozen turkey labels listing the weight of the turkey and the weight of the stuffing separately and, in the case of the Swift proposal, the combined weight as well (R. 281, 287). Both labels were disapproved by the head of the Poultry Products Section of the Inspection Branch of the Poultry Division of the Department of Agriculture's Consumer and Marketing Service (formerly the Agricultural Marketing Service) (R. 167–168).

The gist of the Poultry Products Section's comments at the time of rejecting the proffered labels and in a later amplifying letter was that: (1) "The net weight shown in the manner proposed would be confusing to the consumer," (2) "it would be impossible for the consumer to verify accurately any weight other than total net weight" because "during the defrosting of the frozen stuffed turkey the natural juices from the carcass are absorbed by the dressing," (3) the turkeys would have to be weighed once before and again after stuffing and the initial weight slip might become "detached from the turkeys during the handling," resulting "in improper weights being shown on the product," (4) "double weighing" would require "the product to be at room temperature for a longer period of time" and "could permit unrestricted growth of the normal bacterial flora," and (5) the Poultry Products Inspection Act is interpreted as requiring the net weight of the entire poultry product, *i.e.*, turkey plus stuffing, to be shown on the label (R. 279–285).

Once a turkey has been frozen it is not practicable to thaw it later in order to determine the separate weight of the stuffing in each bird (R. 233). Thus, the effect of this initial ruling by lower-echelon Agriculture officials was to prevent Swift and Armour from complying with the New York labeling requirements.

Although the Poultry Products Inspection Act,[1] as well as the Secretary's own regulations,[2] expressly afford one whose proposed label has not been approved for use the right to a full-dress administrative hearing before the Secretary of Agriculture, or his delegate, neither Swift nor Armour availed themselves of this opportunity (R. 121). Instead, after receiving the letters of disapproval from the head of the Poultry Products Section, Swift and Armour commenced the instant suit in the United States District Court for the Southern District of New York against Commissioner Wickham.

2. PROCEEDINGS IN THE DISTRICT COURT

In their complaint (R. 1–10), Swift and Armour requested that: (1) a three-judge district court be convened under 28 U.S.C. 2281; (2) the application of Section 193 of the New York Agriculture and Markets Law requiring them to label frozen stuffed turkeys with the separate weights of fowl and filler be declared in violation of the Commerce Clause, the

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[1] § 8(b) of the Act, 21 U.S.C. 457(b); see also 7 U.S.C. 194, 5 U.S.C. 1004, 1006 and 1007.

[2] 7 C.F.R. 81.130(c).

Supremacy Clause, and the Fourteenth Amendment to the United States Constitution; (3) the court declare that Swift, Armour and their vendees had the right to sell frozen stuffed turkeys in New York State bearing labels approved by the Department of Agriculture only; and (4) Commissioner Wickham be enjoined from interfering with their sale in New York State of frozen stuffed turkeys so labeled. A three-judge district court, comprised of Circuit Judge Friendly and District Judges Croake and Wyatt, was duly convened to try the cause (R. 41).

At the trial, William E. Hauver, Deputy Director of the Poultry Division, Consumer and Marketing Service, United States Department of Agriculture, was called as a witness by plaintiffs. Mr. Hauver testified that it was the Department's policy to permit only a single net weight to be shown on the label of any combination poultry product (R. 117). He acknowledged, however, that until the Department had disapproved the Swift and Armour labels it had permitted frozen stuffed Rock Cornish game hens[3] to be marketed with labels stating separately the weights of the Cornish hen and its stuffing (R. 117–118, 142, 145).[4] On cross-examination, he stated that the term "net weight" is defined neither in the Poultry Products Inspection Act nor in the Secretary's regulations

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[3] A Rock Cornish game hen is a type of chicken, slaughtered when young and immature (5 to 6 weeks old), weighing less than two pounds ready-to-cook (eviscerated). 7 C.F.R. (1965 Cum. Supp.) 81.131(f)(1)(i).

[4] Appellants' contention that the Department of Agriculture has a "long-standing policy against multiple weight statements" (Appellants' Brief, p. 4) is thus belied by the facts.

(R. 131, 134–135). Mr. Hauver also conceded that the Department had never conducted any tests to determine whether a double-weighing process to establish separate weights was in fact feasible (R. 129–130, 150), and that, during the years when the Department permitted frozen stuffed Cornish game hens to be marketed with labels noting the weights of the bird and the stuffing separately, no complaint was received from any consumer claiming to have been confused by such labels (R. 149).

An employee of Swift testified that, under his company's present procedures, about thirty minutes elapsed between the time a turkey is placed on the assembly line until it is sent to the freezer completely stuffed, weighed and labeled (R. 80). An additional weighing, he testified, would require only one-third (⅓) of a minute more per bird (R. 81). A witness from Armour stated that their process consumed forty-five minutes per bird (R. 104), and agreed that an additional weighing would require less than half a minute per bird (R. 106). The Armour witness further testified that the additional fifteen minutes during which Armour kept the turkeys at room temperature did not affect their wholesomeness (R. 105, 106).

Both the Swift and Armour witnesses stated that a fixed amount of stuffing is not placed in each bird (R. 71, 77–78, 96); rather, each turkey is stuffed by machine until it presents an attractive appearance (R. 71, 72, 101–102). The amount forced into each carcass varies from 16% to 35% of the weight of the bird (R. 72, 76, 97–99), and there is no way in which anyone can tell accurately from the appearance how much stuffing is contained in a given turkey (R. 75–76).

Mrs. Esther E. Hendler, an inspector of the New York City Bureau of Weights and Measures, testified that as part of her job she had purchased some frozen stuffed turkeys prepared by Swift. She recalled that one of the birds whose net weight was marked as seven pounds, four ounces, contained two pounds, two ounces of stuffing and only five pounds, two ounces of turkey (R. 243). In other words, frozen stuffing constituted 30% of her purchase.

3. THE DECISION BELOW

The three-judge district court dismissed the complaint. In an opinion by Circuit Judge Friendly, the court found that there could be significant variations in the weight of stuffed birds of the same size, even when the processing was done by reputable packers such as Swift and Armour, and that therefore a label showing only the combined weight might not fully inform the consumer. Noting that the New York labeling requirement was applicable to local as well as to interstate packers, did not operate to favor local competitors, afforded reasonable protection for the State's consumers, and that compliance would not be unduly burdensome on interstate commerce, the court concluded that the New York statute did not violate the Commerce Clause and rejected plaintiffs' Fourteenth Amendment argument as "patently baseless." (R. 379–380.)

Next, the district court made a careful analysis of the Poultry Products Inspection Act. It concluded that the Act was aimed at insuring the wholesomeness of fowl marketed in interstate commerce and that the provisions regarding labeling are merely incidental to the primary provisions for inspections of poultry. Thus the court held that the federal Act was not intended to preclude the States from their traditional regulation of weights and measures for the protection of local consumers. With regard to plaintiffs' claim that there was a conflict between the federal and State regulations, the court ruled that where the inconsistency hinges on a factual determination, a citizen desiring freedom from State regulations does not discharge his burden by obtaining a letter from a subordinate federal official, "at least when Congress has laid out a fact-finding procedure as to which the state could be given notice and an opportunity to be heard" (R. 390). The court concluded that it was highly unlikely that the Department of Agriculture, after a full departmental hearing, would reject New York's labeling requirement. Thus the court interpreted the Department of Agriculture's letter as rejecting only the particular labels submitted, and not all supplementary dual weight labels. (R. 381–390.)

Finally, the court considered whether this was a proper case for a three-judge court under 28 U.S.C. 2281. It concluded that, under the decision in *Kesler v. Department of Public Safety,* 369 U.S. 153, this was a borderline case. Out of an abundance of caution, the court directed that judgments be entered dismissing the complaint both in the name of the three-judge court and in the name of District Judge Croake, the single judge who would otherwise have tried the cause and who stated he would have reached the same result independently. (R. 390–392.)

This appeal followed. The Court ordered appellee's motion to affirm the judgment below or to dismiss the appeal held in abeyance pending a hearing on the merits and invited the Solicitor General to file a brief on the merits. 379 U.S. 997. This brief for the United States as *amicus curiae* is filed in response to that invitation.

SUMMARY OF ARGUMENT

I

New York's requirement that stuffed poultry offered for sale to consumers in that State bear labels showing separately the weight of the bird and the stuffing violates neither the Commerce Clause nor the Fourteenth Amendment. This Court has long recognized that the States have a legitimate interest in protecting their citizens against deception in the retail sale of food products. *Plumley* v. *Massachusetts,* 155 U.S. 461, 472; *Armour & Co.* v. *North Dakota,* 240 U.S. 510; *Corn Products Refining Co.* v. *Eddy,* 249 U.S. 427, 431–432; *Florida Avocado Growers* v. *Paul,* 373 U.S. 132, 143–146. The amount of stuffing in a frozen turkey varies from bird to bird and cannot be determined by the retail purchaser from the appearance of the poultry product alone (R. 75–76). Compliance with New York's non-discriminatory "dual-weight" labeling requirement would require only an additional fraction of a minute per bird (R. 81, 106); it is thus no more burdensome than similar State requirements upheld in the past. See, *e.g., Patapsco Guano Co.* v. *North Carolina,* 171 U.S. 345; *Savage* v. *Jones,* 225 U.S. 501.

II

The provisions of the federal Poultry Products Inspection Act dealing with labeling, 21 U.S.C. 457, do not pre-empt New York's power to impose higher labeling standards for retail sale in that State. "[F]ederal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably so ordained." *Florida Avocado Growers* v. *Paul,* 373 U.S. 132, 142. Neither the statutory language nor the legislative history of the Poultry Products Inspection Act reveals any congressional intention to pre-empt the traditional State regulation of weights and measures on retail food items. Rather, Congress was focusing on the discrete problem of insuring the wholesomeness of poultry during production, slaughter and interstate shipment.

Moreover, nothing in the nature of the subject matter, *i.e.,* the labeling of poultry products offered for retail sale, precludes concurrent federal and State regulation. Indeed, this Court has often upheld State laws requiring disclosure of weights and ingredients on items sold at retail within their borders which required more information than the applicable federal statutes. See, *e.g., Savage* v. *Jones,* 225 U.S.

501; *Hebe Co.* v. *Shaw,* 248 U.S. 297; *Corn Products Refining Co.* v. *Eddy,* 249 U.S. 427.

III

While an otherwise proper State law must yield to a valid conflicting federal regulation, we agree with the three-judge district court that the question of conflict between State and federal law is not ripe for resolution on this record. Both the Poultry Products Inspection Act and the Secretary of Agriculture's regulations call only for a disclosure of the "net weight or other appropriate measure of the contents," 21 U.S.C. 457(a); 7 C.F.R. 81.130(3). On their face at least, they do not necessarily conflict with New York's requirement. Appellants' allegation of conflict between New York law and federal regulation rests entirely on the ruling of lower-echelon Agriculture employees who summarily rejected appellants' proffer of "dual-weight" labels. Although appellants had a statutory right to a full administrative hearing (in which New York could have intervened), with review by the Secretary of Agriculture's Judicial Officer, they chose to let the matter rest after a brief exchange of correspondence with subordinate agency employees.

Sound principles of administrative law preclude appellants from asking a federal court to enjoin an otherwise valid State law on grounds of "conflict" without first obtaining an authoritative determination from the highest available administrative level that such a clash exists. See, *e.g., Federal Power Commission* v. *Arkansas Power & Light Co.,* 330 U.S. 802;

Public Utilities Commission v. *United Air Lines*, 346 U.S. 402; *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481. To begin with, it is by no means certain that, after an administrative hearing at which New York can intervene and fully present its position, the agency's high level officials will agree with their subordinate employees' position. Moreover, a judicial ruling at this stage of the litigation might prejudice the public's interest in proper administration of the Poultry Products Inspection Act. The present record is confined to the material thought relevant by the litigating parties—New York and appellants. Neither the views nor the supporting evidence of the Department of Agriculture have been fully developed here. Finally, affirmance of the district court's decision will prevent premature, and perhaps wholly unnecessary, judicial resolution of complicated and delicate questions involving both technical data and federal-State relationships.

ARGUMENT

I.

THE NEW YORK STATUTE REGULATING THE LABELING OF WEIGHTS AND MEASURES OF FOODSTUFFS OFFERED FOR RETAIL SALE VIOLATES NEITHER THE COMMERCE CLAUSE NOR THE FOURTEENTH AMENDMENT

We agree with the court below that New York Agriculture and Markets Law, § 193, regulating the labeling of weights on retail foodstuffs sold in New York, does not violate either the Commerce Clause or the Fourteenth Amendment. This Court has long recognized that "the States have always possessed a legitimate interest in 'the protection of * * * [their] people against fraud and deception in the sale of food products' at retail markets within their borders." *Florida Avocado Growers* v. *Paul,* 373 U.S. 132, 144 (1963), quoting from *Plumley* v. *Massachusetts,* 155 U.S. 461, 472 (1894). In short:

> [I]t is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold. The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the State, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth. * * * [*Corn Products Ref. Co.* v. *Eddy,* 249 U.S. 427, 431-432. See also, *Armour & Co.* v. *North Dakota,* 240 U.S. 510.]

The Court has in the past rejected challenges, based on such Constitutional grounds, to similar State legislation adopted in the interest of consumers.[5] So long as the State regulation is applied evenhandedly to local and out-of-State interests alike and its incidental effect on interstate commerce is not unduly burdensome, it transgresses neither the Commerce Clause nor the Fourteenth Amendment. *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 442–444; *Florida Avocado Growers* v. *Paul*, 373 U.S. 132, 143–146.

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[5] See, *e.g., Patapsco Guano Co.* v. *North Carolina,* 171 U.S. 345 (State legislation requiring, *inter alia,* net weight in pounds to be labeled on a commodity container); *Savage* v. *Jones,* 225 U.S. 501 (Indiana requirement that certain concentrated feed be labeled with ingredients and net weight in pounds); *Schmidinger* v. *Chicago,* 226 U.S. 578 (Chicago ordinance requiring bread to be sold at retail only in loaves of designated pound multiples); *Armour & Co.* v. *North Dakota,* 240 U.S. 510 (State law requiring lard to be sold only in designated pound multiples); *Corn Products Refining Co.* v. *Eddy,* 249 U.S. 427 (Kansas statute requiring contents of proprietary foods to be stated on label); *Petersen Baking Co.* v. *Bryan,* 290 U.S.

The record before the Court leaves no doubt that the retail sale of frozen stuffed turkeys is an appropriate subject of the State's surveillance. The proportion of bread and bird in any given stuffed turkey cannot be ascertained by the consumer before purchase in the absence of such information on its label (R. 75–76). Compliance with New York's requirement that the label show separately the weight of the fowl and the filler is certainly no more burdensome than similar State labeling regulations previously upheld by the Court in *Patapsco Guano Co.* v. *North Carolina* and *Savage* v. *Jones*, *supra*, n. 5, p. 14. In fact, the record indicates that the additional weighing necessary here would require but a fraction of a minute per bird (R. 81, 106); that another company marketed frozen stuffed Cornish game hens (immature chickens) under such dual weight labels for a substantial period without apparent difficulty (R. 149–150); and that appellants themselves were fully prepared to do likewise with stuffed turkeys until approval of their "dual weight" label was withheld.

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570 (Nebraska law fixing standard size for loaf of bread); *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176 (Oregon law requiring strawberries to be sold only in hampers of a specified size).

II.

THE POULTRY PRODUCTS INSPECTION ACT DOES NOT PREVENT STATE REGULATION OF LABELS, WEIGHTS AND MEASURES OF SUCH ITEMS WHEN OFFERED FOR RETAIL SALE

Although regulation of the weights and measures used in retail food sales is an entirely appropriate subject for New York's police powers, Congress has included a provision in the Poultry Products Inspection Act requiring the labels of inspected poultry to disclose the "net weight or other appropriate measure of the contents." § 8 of the Act, 21 U.S.C. 457. Appellants urge that this pre-empts further regulation of such labels by New York State. We disagree. To be sure, State legislation which affects interstate commerce must yield to federal enactments which pre-empt the field of regulations. See, *e.g., Campbell* v. *Hussey,* 368 U.S. 297. However, it will not lightly be presumed that Congress intended to occupy an entire area of the law and to exclude all State regulation touching on the same subject. "[F]ederal regulation of a field of commerce should not be deemed pre-emptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained." *Florida Avocado Growers* v. *Paul,* 373 U.S. 132, 142. See also, *Head* v. *New Mexico Board,* 374 U.S. 424, 429-432; *Huron Cement Co.* v. *Detroit,* 362 U.S. 440, 443-444.

Our examination of the Poultry Products Inspection Act and its legislative history persuades us, for several reasons, that Congress did not intend this legislation to preclude State regulation of weights and measures on poultry sold at retail.

1. The Poultry Products Inspection Act contains no express prohibition against State regulation of weights, measures and labels used in connection with the retail sale of poultry products. While the pertinent provisions of the Act detail certain matters which must appear on the labels of inspected poultry products, they do not expressly preclude additional information, but only matters which are false or misleading.[6] §§ 8 (a), (b) and 9 (c), (d), (e) of the Act, 21 U.S.C. 457 (a), (b) and 458 (c), (d), (e). In fact, the labels which were approved for appellants' use on stuffed turkeys themselves contain information in addition to that required by Section 457(a), to wit, special cooking instructions (R. 38–40).

2. Nor do we think that the Act implies any such prohibition. Both the statutory language and the legislative history of the Act indicate, we believe, that Congress was focusing upon the need for nationwide federal inspection of poultry shipped in interstate commerce. The Act itself reveals that Congress recognized that a great volume of poultry products were "consumed throughout the Nation" and constituted "an important source of the Nation's total supply of food"; Congress was concerned that State inspection programs might be inadequate to keep "[u]nwholesome and adulterated poultry products [out of] * * *

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[6] See the discussion of § 18(a) of the Act, 21 U.S.C. 467, *infra*, pp. 20–23.

the channels of interstate or foreign commerce * * *." § 2 of the Act, 21 U.S.C. 451. Thus, the Act explicitly:

> declared [it] to be the policy of Congress to provide for the inspection of poultry and poultry products by the inspection service as herein provided to prevent the movement in interstate or foreign commerce or in a designated major consuming area of poultry products which are unwholesome, adulterated, or otherwise unfit for human food. [§ 3 of the Act, 21 U.S.C. 452.]

Neither the legislative findings nor the declarations of policy reflect any Congressional concern with comprehensive regulation of weights and measures. Indeed, while the dozens of witnesses who testified in support of this legislation before the sponsoring House and Senate Committees were almost unanimously in favor of compulsory poultry inspection, not one suggested federal control of the labeling of weights and measures.[7]

Similarly, the congressional debates reveal Congress' concern with a problem which the States could no longer control. The poultry industry had developed in the previous half-century from a fairly local operation to one nationwide in scope, involving the interstate shipment of billions of birds annually.[8] As a result, individual State health inspection programs had proven inadequate. Much of the poultry came from plants beyond the borders of the State where sold, so that the State of sale could inspect neither the birds' freedom from disease before slaughter nor the santitary conditions of the slaughter houses.[9] Moreover, a federal program of voluntary inspection was successful in reaching less than thirty per cent of the poultry consumed annually.[10] The Poultry Products Inspection Act was thus primarily designed to close this serious gap in the nation's health laws. Nowhere in the debates, the committee reports, or the hearings was any suggestion made that State regulation of weights and measures on labels was inadequate, much less that this traditional area of State concern was to be pre-empted by the proposed legislation.[11]

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[7] See *Hearings before the Senate Committee on Agriculture and Forestry on S. 313, S. 645, and S. 1128*, 85th Cong., 1st Sess., Feb. 27 and 28, 1957; *Hearings before the Subcommittee on Poultry and Eggs of the House Committee on Agriculture*, 85th Cong., 1st Sess., March 6, 7, 8, and 15, 1957.

[8] See 103 Cong. Rec. 5228, 5239–40, 11,114–15, 11,121–23.

We therefore submit that Section 8(a) of the Act (21 U.S.C. 457(a))—which requires, *inter alia,* "net weight" labels on inspected poultry products—was merely intended to "round * * * out" the Act's principal purpose of providing a mandatory nationwide inspection service to insure the wholesomeness of poultry. H. Rep. No. 465, 85th Cong., 1st Sess., p. 1. As the lower court phrased its conclusion, the Act's "provisions as to labelling * * * are *merely incidental* to the primary provisions for inspection of poultry products." (R. 386, emphasis added.) There was thus no manifest congressional purpose to strip the States of their traditional power to protect their consumers through regulation of weights and measures on the labels of goods sold in the State. Cf., *Florida Avocado Growers* v. *Paul,* 373, U.S. 132, 145; 103 Cong. Rec. 5237–5238 (remarks of Senator Holland).

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[9] See 103 Cong. Rec. 5237, 11,115, 11,718.

[10] See 103 Cong. Rec. 5239, 11,117–20, 11,123.

[11] Thus the situation here is totally unlike that in *Campbell* v. *Hussey*, 368 U.S. 297, where the statutory language and the legislative history of the Federal Tobacco Inspection Act revealed a congressional intent to establish a single national standard of tobacco labeling which pre-empted State regulation. The Tobacco Act expressly stated that its purpose was to create "uniform standards of [tobacco] classification" which would be "the official standards of the United States." 7 U.S.C. 511a, b.

Nor does *Rice* v. *Santa Fe Elevator Corp*, 331 U.S. 218, assist appellants. The Court based its holding in that case on the United States Warehouse Act's "unequivocal" legislative history. 331 U.S. at 233–235.

3. The Poultry Products Inspection Act provisions relating to labeling are similar to those contained in the Federal Food, Drug, and Cosmetic Act. 21 U.S.C. 321(k), (l), (m), and 331 (a), (b), (i), (k). This Court has consistently held that the Food, Drug, and Cosmetic Act did not preempt State regulation of labels and has upheld State laws requiring disclosure of weights and ingredients on items sold at retail within their borders, which went further and required more information than the applicable Federal Food, Drug, and Cosmetic Act. *Savage* v. *Jones,* 225 U.S. 501; *Armour & Co.* v. *North Dakota,* 240 U.S. 510; *Hebe Co.* v. *Shaw,* 248 U.S. 297; *Corn Products Refining Co.* v. *Eddy,* 249 U.S. 427.[12] In the circumstances,

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[12] *McDermott* v. *Wisconsin,* 228 U.S. 115, is not contrary. There, State regulations would have required removal of a federally approved label and were for that reason disapproved. The right to require information on the label in addition to that furnished under the federal Act was specifically upheld in the subsequent case of *Corn Products Refining Co.* v. *Eddy,* 249 U.S. 427.

it seems unlikely that Congress intended parallel legislation to pre-empt State regulation without expressly so stating. Cf., *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176; *Florida Avocado Growers* v. *Paul*, 373 U.S. 132.

To be sure, Section 18(a) of the Poultry Products Inspection Act does provide that (21 U.S.C. 467(a)):

> For the purpose of preventing and eliminating burdens on interstate commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this Act shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act, as amended, to the extent of the application or the extension thereto of the provisions of this chapter.

This provision and similar comments in the legislative history must be understood, however, in light of the underlying purposes of the Act, *i.e.*, the establishment of requisite standards for preparing and packaging poultry prior to its shipment in interstate commerce.[12a] The Act here in question is closely analogous, in this respect, to that considered in *Florida Avocado Growers* v. *Paul*, 373 U.S. 132. In that case the Court held that the Secretary of Agriculture's authority to set standards governing the type of avocados that qualified for interstate shipment did not prevent California from imposing higher standards for avocados sold at retail in that State in order to protect its own citizens. 373 U.S. at 144–145. It stated that "[c]ongressional regulation of one end of the stream of commerce [here production, slaughter and interstate shipment of fowl] does not, *ipso facto*, oust all state regulation at the other end [here, as in *Florida Avocado*, food retailing]." *Id.* at 145.

[12a] Compare 103 Cong. Rec. 5,237–5,238 (Remarks of Senator Holland) with 103 Cong. Rec. 15,170 (Remarks of Senator Humphrey).

Our views also find confirmation in the committee reports, which state that Section 18(a) was meant to "provide * * * the same exemption for poultry and poultry products from the Food, Drug, and Cosmetic Act as presently applies to red meats"[13] under the Meat Inspection Act. That Act, like the Poultry Products Inspection Act, requires inspected meat products to be wholesome and bear approved labels before shipment in interstate commerce. 21 U.S.C. 71–79. However, after the interstate meat shipment has been completed, the Food, Drug, and Cosmetic Act applies. *United States* v. *Kocmond*, 200 F. 2d 370 (C.A. 7), certiorari denied, 345 U.S. 924.[14] Of course, once the Food, Drug, and Cosmetic Act applies to the meat, the State where retail sale takes place is free to require additional label disclosures. See cases cited, *supra*, p. 20. Therefore if Section 18(a) of the Poultry Products Inspection Act, 21 U.S.C. 467(a), gives the Secretary of Agriculture only the same exclusivity of jurisdiction as he enjoys under the Meat Inspection Act, the statute does not preclude the State where the poultry is retailed from requiring more comprehensive label disclosures.

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[13] S. Rep. No. 195, 85th Cong., 1st Sess., p. 6; H. Rep. No. 465, 85th Cong., 1st Sess., pp. 6–7.

[14] This case upheld a conviction under the Food, Drug, and Cosmetic Act of a meat packer who removed federal inspection stamps affixed under the Meat Inspection Act and attempted to sell horse meat as beef.

4. Finally, nothing in the nature of the subject matter being regulated—disclosure of net weights on the labels of poultry for retail sale—requires a uniform national standard. "On the contrary, [this] * * * is a subject matter of the kind this Court has traditionally regarded as properly within the scope of state superintendence." *Florida Avocado Growers* v. *Paul,* 373 U.S. 132, 144. Indeed, much poultry is now disjointed after its arrival at the retail store and sold in parts. The correct labeling of weights upon items sold under such conditions seems an inherently unlikely matter for exclusive federal concern. We observe nothing in the poultry retailing industry sufficient to distinguish it from other branches of the retail food industry. See, *e.g., Florida Avocado Growers* v. *Paul, supra; Cloverleaf Co.* v. *Patterson,* 315 U.S. 148, 162; *Savage* v. *Jones,* 225 U.S. 501; *Hebe Co.* v. *Shaw,* 248 U.S. 297; *Armour & Co.* v. *North Dakota,* 240 U.S. 510; *Corn Products Refining Co.* v. *Eddy,* 249 U.S. 427; *Pacific States Box & Basket Co.* v. *White,* 296 U.S. 176; cf., *Huron Cement Co.* v. *Detroit,* 362 U.S. 440; *Head* v. *New Mexico Board,* 374 U.S. 424.

Moreover, the Poultry Products Inspection Act does not blanket the entire poultry industry. Intrastate shipments of poultry, unless made in a specially designated major consumption area, are not covered. §§ 5, 6 of the Act, 21 U.S.C. 454, 455. In addition, certain types of poultry dealers may be exempted from regulation. § 15 of the Act, 21 U.S.C. 464. Thus, the Act would, in no event, provide a uniform standard of labeling for all poultry products.

In sum, we submit that in enacting the labeling provisions of the Poultry Products Inspection Act, Congress was prescribing standards to be met for the shipment of the commodity in interstate commerce. It was not focusing upon the other end of the stream of commerce—the distribution of poultry products to the local retail consumer. At least so far as regards the regulation of retail weights and measures, the absence of a clear statutory prohibition against concurrent State regulation, the complete absence from the legislative history of any statement in favor of uniform nationwide label regulation, and the inherent unsuitability of the subject matter for uniform national regulation, all lead us to conclude that the Act did not withdraw the States' traditional power to set higher standards for the protection of consumers.

While we have thus concluded that there is no *inherent* reason why the Poultry Products Inspection Act should preclude New York State's regulation of retail weights and measures, we recognize the apparent conflict between the New York requirements and the federal Act *as applied* to the labeling of frozen stuffed turkeys in this case. We therefore turn now to that more limited question: whether the New York legislation must give way to the particular application of the federal Act presented in this case.

III.

WHETHER THERE IS A CONFLICT BETWEEN FEDERAL AND NEW YORK LAW TO WHICH THE NEW YORK REGULATION MUST YIELD IS NOT RIPE FOR DECISION ON THIS RECORD

Because of their nature, if frozen stuffed turkeys are to bear labels detailing their weights both stuffed and unstuffed, that information must be ascertained and affixed at the time the poultry product is prepared and frozen. After the frozen turkey is received at the retail market it is not practical to thaw it, determine the weight of its components, and refreeze it. The Agriculture Department insists, as it has a right to do, that no inspected poultry product be shipped in interstate commerce unless it bears a label approved by the Department. Therefore, should the Secretary of Agriculture bar the use of any "dual weight" label, plaintiffs would as a practical matter be unable to comply with New York's labeling requirements, and it might well be necessary for the New York law to give way. *Florida Avocado Growers* v. *Paul,* 373 U.S. 132, 142-143; *McDermott* v. *Wisconsin,* 228 U.S. 115, 137. However, we agree with the district court that the question of conflicting applications of State and federal law is not ripe for resolution on this record (R. 389-390).

Although the New York definition of "net weight" as applied to frozen stuffed turkeys is adequately demonstrated in the record, it is by no means established that the Secretary of Agriculture has made a conflicting determination as to the requirements imposed by similar language in the federal Act. The Poultry Products Inspection Act itself merely requires that an inspected bird be labeled with its "net weight or other appropriate measure of the contents * * *." § 8(a) of the Act, 21 U.S.C. 457(a). The Secretary's regulations, helpful in spelling out other facets of the Act's labelling requirements (see 7 C.F.R. 81.125–81.156), do not speak to the problem in question, *i.e.*, whether a dual-weight label is prohibited (R. 131, 134–135). Appellants' claim of conflict rests only upon comments by subordinate Agriculture officials.

Swift and Armour, however, had a statutory right to obtain a full administrative hearing, merely by filing a simple request. § 8(b) of the Act, 21 U.S.C. 457(b). In that event, a hearing examiner could have taken evidence from all interested parties (including Swift, Armour, the Department of Agriculture's investigators and the State of New York), found the facts and promulgated conclusions. 5 U.S.C. 1004, 1006, 1007. Upon request of any participant the propriety of appellants' dual-weight labels would then have been reviewed by the Judicial Officer of the Department of Agriculture, who is immediately under the Secretary of Agriculture in authority. 10 Fed. Reg. 13,769; 11 Fed. Reg. 177A–233; 18 Fed. Reg. 3219, 3648; 5 U.S.C. 516b.

For reasons sufficient to themselves, however, appellants chose to let the matter rest after a brief exchange of correspondence with subordinate Agriculture employees. Appellants' answer is that they have "accepted" the low-level administrative determination disapproving their use of dual-weight labels. We submit, however, that sound principles of administrative law preclude Swift and Armour from asking a federal court to enjoin an otherwise valid State law on the ground of conflict with federal administrative regulations without having first obtained an authoritative interpretation of those regulations at the highest available administrative level. Regardless of whether Swift and Armour are willing to waive any further administrative review, a full exhaustion of administrative remedies is a prerequisite either to invoking the federal regulation against the State of New York or to testing the validity of the administrative ruling in the courts.[15] Our reasons for this view are threefold:

First, it would protect the State of New York's legitimate interest in not having its laws enjoined unless and until there is in fact a clear and irreconcilable conflict with a federal statute or regulation. It cannot now be predicted with assurance whether, upon consideration of a full record developed in the administrative hearing which Congress has explicitly made available and in which New York may intervene and present evidence, the Secretary of Agriculture's top-level delegate will agree with the conclusion reached by his subordinate. Indeed, so far as the record discloses, the Agriculture employee who rejected appellants' proffered dual-weight labels was not at that time aware that New York required a dual-weight disclosure (R. 283–284). In the quasi-judicial hearing which Swift and Armour could so easily have initiated, the Secretary of Agriculture's delegate would undoubtedly have accorded appropriate weight to New York's position. See § 18(b) of the Act, 21 U.S.C. 467(b), encouraging cooperation between the Secretary of Agriculture and State agencies, and § 8(a) of the Act, 21 U.S.C. 457(a), permitting the Secretary of Agriculture to allow reasonable variations and grant exemptions from the Act's labeling requirements.

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[15] If Swift and Armour, without obtaining any ruling whatsoever from the Department of Agriculture, had asked the district court to enjoin New York's dual-weight requirement as conflicting with federal law, the court would undoubtedly have declined to issue an injunction. The courts will not speculate on whether the Secretary of Agriculture would interpret the federal requirement of "net weight" as precluding a dual-weight label. The present record does not offer the Court any surer guess as to the position the Department of Agriculture will ultimately adopt when called upon to rule in the context of a full record.

Since Swift and Armour chose not to pursue the question of dual weight labeling within the Department of Agriculture, but instead initiated this action in a federal district court for an injunction against the State of New York, we are unable to state with any degree of certainty whether the Department of Agriculture's ultimate ruling would have conflicted with New York law. Accordingly, we believe that Swift and Armour, having failed to exhaust the administrative avenues open to them, cannot rely on the ruling of a subordinate Agriculture employee as creating a sufficient conflict to enjoin the enforcement of New York's otherwise valid law.

Second, a ruling on the merits in the present posture of the instant case may well prejudice the legitimate interests of the public in the proper administration of the Poultry Products Inspection Act. The record is confined to the material thought relevant to the litigating positions of Swift and Armour on one hand and the State of New York on the other. The views of the Department of Agriculture have not been fully developed. They are represented by a single letter and two short comments from subordinate officials, together with the testimony of one witness, elicited during examination and cross-examination by counsel primarily interested in supporting their clients' partisan positions. Other grounds which might justify the denial of dual-weight labels may well be unexpressed in the record. Requiring the plaintiffs to obtain a ruling from the highest available administrative level before asking for an injunction against a purportedly conflicting State regulation would insure that rulings of federal administrative agencies will not be judicially reviewed until the agency has brought its full resources to bear on the problem and made a complete record.

Finally, the district court's decision prevents premature and perhaps wholly unnecessary judicial resolution of serious and difficult questions involving both technical data and delicate federal-State relationships. On more than one occasion this Court has refused to short-circuit the administrative process where private parties, faced with apparently conflicting demands of State and federal administrative agencies, prematurely requested judicial relief. See, *e.g.*, *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802, reversing *per curiam,* 156 F. 2d

821 (C.A.D.C.); *Public Utilities Commission* v. *United Air Lines,* 346 U.S. 402; see also *Public Service Commission* v. *Wycoff Co.,* 344 U.S. 237; *Whitney Nat'l Bank* v. *Bank of New Orleans,* 379 U.S. 411.

The *Arkansas Power & Light* case is particularly apposite here. The Arkansas Public Service Commission had ordered the power company to keep its principal set of books in a certain manner. The staff of the Federal Power Commission asserted that the power company should keep its principal set of books in a different manner, and the Federal Power Commission issued an order to show cause why the company should not comply. Instead of attending the FPC hearing which it was entitled to receive, the power company immediately brought suit against both the FPC and the State Commission and asked the federal district court to decide which agency it should obey. In its responsive pleadings, the FPC asserted its exclusive jurisdiction to regulate the power company's bookkeeping, but argued that the federal courts should not yet enter the controversy because the FPC had not held hearings and reached a final conclusion at its highest administrative level. This Court, reversing the court of appeals, held, *per curiam,* that the Arkansas Power Company's complaint should have been dismissed "on the ground that [it] has failed to exhaust its administrative remedies." 330 U.S. 802. Both the appellants in the instant case and the plaintiff in *Arkansas Power* had one paramount interest: to avoid subjection to conflicting State and federal regulations. In both cases they attempted to circumvent the administrative decisional process by going to court rather than permitting the federal agency to hold a hearing, take evidence, and exercise its collective expertise at a high administrative level. And here, as in that case, they should be relegated to their administrative remedies first.

These cases are bottomed on the basic principle that when Congress creates an administrative agency with expertise in a given area, the courts should not be the first to pass on subjects within the agency's ken. Rather, they should refrain until the agency has brought its expertise to bear on the particular problem by "mak[ing] a preliminary, comprehensive investigation of all the facts, analyz[ing] them, and appl[ying] to them the statutory scheme as it is construed." The courts thus "avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and in marshaling them into a meaningful pattern." *Federal Maritime Board* v. *Isbrandtsen Co.,* 356 U.S. 481, 498. See also, *e.g., Far East Conference* v. *United States,* 342 U.S. 570, 574–575; *Federal Power Commission* v. *Metropolitan Edison Co.,* 304 U.S. 375, 384.

This Court has warned that a court "usurps the agency's function [if it] * * * deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Commission* v. *Aragon,* 329 U.S. 143, 155.[10] Accordingly, in *United*

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[10] With regard to an agency's fact finding authority, Mr. Justice Holmes, speaking for the Court, has stated that "before the courts can be called upon, the preliminary sifting process

States v. *Ruzicka,* 329 U.S. 287, this Court refused to permit judicial review of the validity of a preliminary determination by the Department of Agriculture; instead the Court postponed all form of judicial review until the Secretary of Agriculture could hold a hearing, make a final determination of policy, and set forth his reasoning:

> Even when [questions as to the validity of the agency's determinations] are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the milk industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture. *It is on the basis of his ruling, and of the elucidation which he would presumably give to his ruling, that resort may be had to the courts.* * * * [329 U.S. at 294, emphasis added.]

A ruling on the merits of the instant case at this time would frustrate this basic principle. The Department of Agriculture has conducted no hearings, taken no testimony and initiated no tests. In short, it has made no record whatsoever. This can hardly be said to satisfy the elementary principle that the

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provided by the statutes must be gone through with." *United States* v. *Sing Tuck*, 194 U.S. 161, 170. And regarding the agency's scope in policy matters, the Court has written:

"* * * where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. * * * [The agency's] determination * * * is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, 131.

courts should not pass on such matters without first "permit[ting] agency expertise to be brought to bear." *Whitney Nat'l. Bank* v. *Bank of New Orleans,* 379 U.S. 411, 420. Indeed, the district court proceedings in the instant case demonstrate that judicial review at this stage would be premature. Here, as in *Macauley* v. *Waterman Steamship Corp.,* 327 U.S. 540, 545, "the administrative process, far from being exhausted, had hardly begun."

We therefore agree with the unanimous decision of the three-judge district court that Swift and Armour are not entitled to equitable relief at this time.[17] We respectfully submit that the Court should not decide, on the basis of the present record, whether there is an unavoidable and irreconcilable conflict between federal and New York law. If the decision of the lower court is affirmed, Swift and Armour may submit dual-weight labels to the Department of Agriculture and, if rejected, request the administrative hearing afforded by statute. The State of New York may then intervene to present its views and evidence. In this manner the Secretary of Agriculture's highest delegate will be enabled to collect and marshal the facts and make the policy judgments entrusted to the Secretary of Agriculture by Congress, subject to judicial review.[18]

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[17] Whether Swift and Armour would be entitled to a temporary injunction during the pendency of a hearing before the Department of Agriculture need not be decided as they have never requested interim relief.

[18] Of course, it would be appropriate for private parties such as Swift and Armour, on the one hand, to inform the Department of Agriculture officials who are reviewing their requests

CONCLUSION

For the reasons stated, we submit that the decision below should be affirmed on the grounds that: (1) the New York Regulation is a permissible exercise of that State's police powers and does not unreasonably burden interstate commerce; (2) the Poultry Products Inspection Act does not preempt State regulation of the labeling of the weights and measures of poultry offered for retail sale; and (3) on the basis of the present record and because of plaintiffs' failure to obtain a ruling from the highest available administrative level, the Court cannot now determine whether New York's regulation must give way because of a valid, conflicting application of the federal Act.

Respectfully submitted.

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September 1965.

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of the potential conflict with State law and, on the other hand, to notify the State of the existence of the Department of Agriculture proceeding so that it may intervene. See Appellants' Brief, pp. 25–26. Whether such an obviously desirable procedure by the private applicant is a necessary prerequisite to affirmative use of the administrative ruling as a basis for injunctive relief against a State need not be decided at this time.

APPENDIX

The pertinent provisions of the Poultry Products Inspection Act, 71 Stat. 441, as amended, 21 U.S.C. 451 *et seq.*, provide:

LEGISLATIVE FINDING

SEC. 2. [21 U.S.C. 451] Wholesome poultry products are an important source of the Nation's total supply of food. Such products are consumed throughout the Nation and substantial quantities thereof move in interstate and foreign commerce. Unwholesome and adulterated poultry products in the channels of interstate or foreign commerce, are injurious to the public welfare, adversely affect the marketing of wholesome poultry products, result in sundry losses to producers, and destroy markets for wholesome poultry products. The marketing of wholesome poultry products is affected with the public interest and directly affects the welfare of the people. All poultry and poultry products which have or are required to have inspection under this Act are either in the current of interstate or foreign commerce or directly affect such commerce. That part that enters directly into the current of interstate or foreign commerce cannot be effectively inspected and regulated without also inspecting and regulating all poultry and poultry products processed or handled in the same establishment.

The great volume of poultry products required as an article of food for the inhabitants of large centers of population may directly affect the movement of poultry and poultry products in interstate commerce. To protect interstate commerce in poultry and poultry products inspected for wholesomeness, from being adversely burdened, obstructed, or affected by uninspected poultry or poultry products, major consuming areas where poultry or poultry products are handled or consumed in such volume as to affect the movement of inspected poultry or poultry products in interstate commerce should be designated by the Secretary pursuant to the provisions of this Act.

DECLARATION OF POLICY

SEC. 3. [21 U.S.C. 452]. It is declared to be the policy of Congress to provide for the inspection of poultry and poultry products by the inspection service as herein provided to prevent the movement in interstate or foreign commerce or in a designated major consuming area of poultry products which are unwholesome, adulterated, or otherwise unfit for human food.

DEFINITIONS

SEC. 4. [21 U.S.C. 453] For purposes of this Act—

* * * * *

(n) The term "label" means any written, printed, or graphic material upon the shipping container, if any, or upon the immediate container, including but not limited to an individual consumer package, of the poultry product, or accompanying such product.

* * * * *

DESIGNATION

SEC. 5. [21 U.S.C. 454] Upon application by an appropriate State or local official or agency of a substantial portion of any major consuming area or upon application by an appropriate local poultry industry group in such area, where the Secretary has reason to believe that poultry or poultry products are handled or consumed in such volume as to affect, burden, or obstruct the movement of inspected poultry products in interstate commerce, the Secretary shall conduct a public hearing to ascertain whether or not it will tend to effectuate the purposes of this Act for such area to be subject to the provisions of this Act. If after public hearing the Secretary finds that poultry or poultry products are handled or consumed in such volume as to affect, burden, or obstruct the movement of inspected poultry products in commerce and that the designation of such area will tend to effectuate the purposes of this Act, he shall by order designate such area and prescribe the provisions of this Act which shall be applicable thereto and grant such exemptions therefrom as he determines practicable. Such designation shall not become effective until six months after the notice thereof is published in the Federal Register. On and after the effective date of such designation, all poultry and poultry products processed, sold, received, or delivered in any such area shall be subject to the provisions of this Act.

ANTE MORTEM AND POST MORTEM INSPECTION, REINSPECTION, AND QUARANTINE

SEC. 6. [21 U.S.C. 455] (a) For the purpose of preventing the entry into or flow or movement in commerce or a designated major consuming area of any poultry product which is unwholesome or adulterated, the Secretary shall, where and to the extent considered by him necessary, cause to be made by inspectors ante mortem inspection of poultry in any official establishment processing poultry or poultry products for commerce or in, or for marketing in a designated city or area.

(b) The Secretary, whenever processing operations are being conducted, shall cause to be made by inspectors post mortem inspection of the carcass of each bird processed, and at any time such quarantine, segregation, reinspection as he deems necessary of poultry and poultry products in each official establishment processing such poultry or poultry products for commerce or in, or for marketing in a designated city or area.

(c) All poultry carcasses and parts thereof and poultry products found to be unwholesome or adulterated shall be condemned and shall, if no appeal be taken from such determination of condemnation, be destroyed for human food purposes under the supervision of an inspector: *Provided,* That carcasses, parts, and products, which may by reprocessing be made not unwholesome and not adulterated, need not be so condemned and destroyed if so reprocessed under the supervision of an inspector and thereafter found to be not unwholesome and not adulterated. If an appeal be taken from such determination, the carcasses, parts, or products shall be appropriately marked and segregated pending completion of an appeal inspection, which appeal shall be at the cost of the appellant if the Secretary determines that the appeal is frivolous. If the determination of condemnation is sustained the carcasses, parts, and products shall be destroyed for human food purposes under the supervision of an inspector.

* * * * *

LABELING

SEC. 8. [21 U.S.C. 457] (a) Each shipping container of any poultry product inspected under the authority of this Act and found to be wholesome and not adulterated, shall at the time such product leaves the official establishment bear, in distinctly legible form, the official inspection mark and the approved plant number of the official establishment in which the contents were processed. Each immediate container of any poultry product inspected under the authority of this Act and found to be wholesome and not adulterated shall at the time such product leaves the official establishment bear, in addition to the official inspection mark, in distinctly legible form, the name of the product, a statement of ingredients if fabricated from two or more ingredients including a declaration as to artificial flavors, colors, or preservatives, if any, the net weight or other appropriate measure of the contents, the name and address of the processor and the approved plant number of the official establishment in which the contents were processed. The name and address of the distributor may be used in lieu of the name and address of the processor if the approved plant number is used to identify the official establishment in which the poultry product was prepared and packed. The Secretary may permit reasonable variations and grant exemptions from the foregoing labeling requirements in any manner not in conflict with the purposes of this Act.

(b) The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this Act or the container thereof which is false or misleading in any particular is prohibited. No poultry products inspected or required to be inspected pursuant to the provisions of this Act shall be sold or offered for sale by any person, firm, or corporation under any false or deceptive name; but established trade name or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary are permitted. If the Secretary has reason to believe that any label in use or prepared for use is false or misleading in any particular, he may direct that the use of the label be withheld unless it is modified in such manner as the Secretary may prescribe so that it will not be false or misleading. If the person using or proposing to use the label does not accept the determination of the Secretary, he may request a hearing, but the use of the label shall, if the Secretary so directs, be withheld pending hearing and final determination by the Secretary. Any such determination by the Secretary shall be conclusive unless within thirty days after the receipt of notice of such final determination the person adversely affected thereby appeals to the United States court of appeals for the circuit in which he has his principal place of business or to the United States Court of Appeals for the Distrit of Columbia Circuit. The provisions of section 204 of the Packers and Stockyards Act of 1921, as amended, shall be applicable to appeals taken under this section.

PROHIBITED ACTS

SEC. 9. [21 U.S.C. 458] The following acts or the causing thereof are hereby prohibited:

* * * * *

(c) Falsely making or issuing, altering, forging, simulating, or counterfeiting any official inspection certificate, memorandum, mark or other identification, or device for making such mark or identification, used in connection with the inspection of poultry or poultry products under this Act, or causing, procuring, aiding, assisting in, or being a party to, such false making, issuing, altering, forging, simulating, or counterfeiting, or knowingly possessing, without promptly notifying the Secretary of Agriculture or his representative, uttering, publishing, or using as true, or causing to be uttered, published, or used as true, any such falsely made or issued, altered, forged, simulated, or counterfeited official inspection certificate, memorandum, mark, or other identification, or device for making such mark or identification, or representing that any poultry or poultry product has been officially inspected under the authority of this Act when such poultry or poultry product has in fact not been so inspected.

(d) Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product.

* * * * *

COMPLETE COVERAGE OF OFFICIAL ESTABLISHMENTS

SEC. 10. [21 U.S.C. 459] No establishment processing poultry or poultry products for commerce or in or for marketing in a designated major consuming area shall process any poultry or poultry product except in compliance with the requirements of this Act.

EXEMPTIONS

SEC. 15. [21 U.S.C. 464] (a) The Secretary shall, by regulation and under such conditions as to sanitary standards, practices, and procedures as he may prescribe, exempt from specific provisions of this Act—

(1) poultry producers with respect to poultry of their own raising on their own farms which they sell directly to household consumers or restaurants, hotels, and boarding houses for use in their own dining rooms or in the preparation of meals for sales direct to consumers only: *Provided,* That such poultry producers do not engage in buying or selling poultry products other than those produced from poultry raised on their own farms;

(2) retail dealers with respect to poultry products sold directly to consumers in individual retail stores, if the only processing operation performed by such retail dealers is the cutting up of poultry products on the premises where such sales to consumers are made;

(3) for such period of time as the Secretary determines that it would be impracticable to provide inspection and the exemption will

aid in the effective administration of this Act, any person engaged in the processing of poultry or poultry products for commerce and the poultry or poultry products processed by such person: *Provided, however,* That no such exemption shall continue in effect on and after July 1, 1960; and

(4) persons slaughtering, processing, or otherwise handling poultry or poultry products which have been or are to be processed as required by recognized religious dietary laws, to the extent that the Secretary determines necessary to avoid conflict with such requirements while still effectuating the purposes of this Act.

(b) The Secretary may by order suspend or terminate any exemption under this section with respect to any person whenever he finds that such action will aid in effectuating the purposes of this Act.

GENERAL PROVISIONS

SEC. 18. [21 U.S.C. 467] (a) For the purpose of preventing and eliminating burdens on commerce in poultry and poultry products, the jurisdiction of the Secretary within the scope of this Act shall be exclusive and poultry and poultry products shall be exempt from the provisions of the Federal Food, Drug, and Cosmetic Act, as amended, to the extent of the application or the extension thereto of the provisions of this Act.

(b) In carrying out the provisions of this Act, the Secretary may cooperate with other branches of Government and with State agencies and may conduct such examinations, investigations, and inspections as he determines practicable through any officer or employee of a State commissioned by the Secretary for such purpose.

New York State Agriculture and Markets Law, Section 193 (McKinney's Consolidated Laws of New York Annotated, Book 2-8, Cumulative Pocket Pt., 1964), provides:

METHOD OF SALE OF FOOD AND FOOD PRODUCTS

1. Definition of "food" and "food product". The terms "food" and "food product" as used in this section shall include all material, solid, liquid or mixed, whether simple or compound, used or intended for consumption by human beings or domestic animals normally kept as household pets and shall also include all substances or ingredients to be added thereto for any purpose.

2. All food and food products which are sold, offered or exposed for sale by wholesalers, packers, distributors or jobbers shall be sold or offered for sale by net weight, numerical count or standard measure, whichever term shall be applicable, and shall be plainly marked by such person or persons offering the food or food products for sale, in such form or manner as may be prescribed by the commissioner, except that it shall not be necessary to so mark meat, meat products or fish, except shellfish in natural form, provided the net weight be stated on a written invoice and on the shipping container of the meat, meat product or fish.

3. All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the commissioner.

4. All food and food products which are packaged or wrapped by the retailer in advance of being exposed or offered for sale by the retailer shall be accurately marked in such form or manner as may be prescribed by the commissioner, with (a) the net weight or standard measure or numerical count; (b) the selling price per pound or unit of standard measure, and (c) the total selling price.

5. Wherever food or food products are packaged or wrapped for sale by a retailer in advance of being sold or offered for sale, an accurate computing scale shall be maintained so placed as to be easily available to customers.

6. This section shall not apply to sales of (a) eggs, fresh fruits, fresh vegetables, grains and nuts; (b) milk and cream as set forth in section one hundred ninety-one of this chapter; (c) malt beverages as set forth in section one hundred ninety-two-c of this chapter; (d) bread, as set forth in section one hundred ninety-three-a of this chapter; (e) frozen desserts as set forth in section one hundred ninety-three-d of this chapter; (f) alcoholic beverages; and (g) drugs and pharmaceuticals.

U.S. GOVERNMENT PRINTING OFFICE:1969

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SEP 27

JOHN F. DAV

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 9

[illegible] COMPANY, INC. and ARMOUR AND COMPANY,
Appellants,

v.

[illegible] HAM, Commissioner of Agriculture and Markets of the State of New York,
Appellee.

[illegible] From the United States District Court for the Northern District of New York

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IN THE

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No. 9

SWIFT & COMPANY, INC., and ARMOUR AND COMPANY,
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v.

DON J. WICKHAM, Commissioner of Agriculture and
Markets of the State of New York,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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249 Press of Fremont Payne, Inc., 80 Washington St., N. Y.—BOwling Green 9-8153

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IN THE

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OCTOBER TERM, 1965

No. 9

SWIFT & COMPANY, INC. and ARMOUR AND COMPANY,

Appellants,

v.

DON J. WICKHAM, Commissioner of Agriculture and
Markets of the State of New York,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

Opinion Below

The opinion of the United States District Court for the Southern District of New York (R 376-395) is reported at 230 F. Supp. 389.

Jurisdiction

Appellants have invoked the jurisdiction of this Court under Title 28 U.S.C. §§ 1253 and 2101(b).

Questions Presented

1. Was a substantial constitutional question presented by appellants below so as to require the convening of a Three-Judge District Court pursuant to 28 U.S.C. § 2281, and to authorize a direct appeal to this Court?

2. Does the general scheme of the Poultry Products Inspection Act, 71 Stat. 441-449, 21 U.S.C. §§ 451-469, manifest a clear intention on the part of Congress to prohibit the State of New York from properly exercising its police power to protect its citizens from false and misleading weights on food products?

3. Does New York State's Regulation with respect to net weight requirements, as construed by appellee, violate the commerce clause of the United States Constitution so as to render the Regulation invalid?

4. Does New York State's Regulation, as construed by appellee, deny appellants the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution?

Statutes and Regulations Involved

Section 193 of the Agriculture and Markets Law of the State of New York; Regulations 221.40 and 221.9(c) of the Department of Agriculture and Markets of the State of New York; the Poultry Products Inspection Act, 71 Stat. 441-449, 21 U.S.C. 451 *et seq.;* 7 C.F.R. Sections 81.1, 81.3, 81.125, 81.127, 81.130. These statutes and regulations are all set forth in the Appendix to Appellants' Brief.

Statement of the Case

Appellants pack and ship frozen stuffed turkeys to the State of New York from their processing plants in Minnesota and Wisconsin (R 48, 90). Upon entry into New York

State they are sold to retailers who in turn offer them for sale to the general public (R 301, 339). The turkeys are labeled at appellants' processing plants outside New York State so as to show only the total weight of the entire stuffed poultry product (R 110-112).

At the present time appellants' federally approved label does not provide for separate statements as to the net weight of the turkey and the combined weight of the stuffed turkey.

The present controversy arises because the appellee Commissioner of Agriculture and Markets of the State of New York has interpreted the term "net weight" as set forth in New York's Agriculture and Markets Law § 193 to require, that stuffed poultry offered for sale in this State must have indicated on a label attached to the poultry package both the "net weight" of the unstuffed poultry and the total "net weight" of the combined product (R 43, 265, 671).

Although appellants' amended complaint thereafter sought to declare unconstitutional the Agriculture and Markets Law § 193, it is appellee's interpretation of the term "net weight" as used in the State statute that is at issue, since both the federal and State statutes *use the term "net weight"*.

Simply stated, this action involves an alleged conflict of the interpretation of the term "net weight" by State and federal officials. Appellants contend that the Poultry Inspection Division of the federal Department of Agriculture which has jurisdiction over the interstate shipment of appellants' stuffed turkeys has interpreted the term "net weight" in the federal statute to mean the total weight of the stuffed turkey including the stuffing and refuses to approve labels which would separately indicate the weight of the turkey and combined weight of the turkey and stuffing. The appellee has construed this language in the state's statute in its application to the sale of appellants' stuffed turkeys in this State to mean that appellants must separately state the weight of the unstuffed birds and also the total weight of the stuffed birds (R. 221).

The complaint alleged that the federal interpretation preempts appellee's interpretation of the term "net weight" and sought by declaratory judgment to have appellee's application of his weight regulation to appellants' stuffed turkeys shipped in interstate commerce declared invalid and appellee enjoined from interfering with the sale of appellants' stuffed turkeys in New York State. Appellants likewise claimed that appellee's interpretation of his weight regulation violated the commerce and the due process and equal protection provisions of the United States Constitution.

Appellants' motion for the convening of a Three-Judge District Court pursuant to 28 U.S.C. § 2281 was granted. Believing that this case might present a substantial constitutional question, the lower court convened a Three-Judge Court pursuant to 28 U.S.C. 2284. *After trial,* the Three-Judge District Court dismissed the complaint and entered judgment for the appellee.

The Opinion of the Court Below

The Court held that New York's statute and regulations with reference to the sale by net weight of stuffed poultry was not rendered invalid by the commerce clause. Protection of the public against false weights and measures was said by the Court to be a proper exercise of the police power of the State of New York and that a label showing only the total weight of the turkey was not sufficiently informative to consumers. Citing *Patapsco Guano Co.* v. *Board of Agriculture of North Carolina,* 171 U. S. 345 and *Savage* v. *Jones,* 225 U. S. 501, the Court held that New York's regulation, which does not favor local processors is not an undue burden simply because it may require out of state manufacturers to alter their process of manufacture. Appellants' claim that the state regulation violated the Fourteenth Amendment was dismissed as being totally lacking in substance.

The Court directed its attention, in detail, to the argument by appellants that the supremacy clause forbids enforcement of New York's regulation. After analyzing the statute in detail, the Court unanimously concluded that the general scheme of the Poultry Products Inspection Act did not reveal a congressional purpose to oust the states of their "historic undertaking to safeguard their people from improper statements of weight".

Appellants' contention that New York's weight regulation frustrated the congressional purpose by impairing the wholesomeness of poultry was rejected as wholly contrary to the evidence, and that mere enactment of the federal poultry inspection statute did not rule out the state requirements as to weight.

The State Regulation, it was held, did not create an irreconcilable conflict between New York's requirements and federal requirements and both are capable of co-existence.

The Court specifically addressed itself to the method whereby appellants obtained approval from the United States Department of Agriculture. It held that where, as here, the statute, § 457(b) and the Regulations, 7 C.F.R., § 81.130(c) provide a procedure whereby review at the administrative level may be obtained, one may not rely upon a letter from a subordinate federal official in order to avoid compliance with state regulations.

Finally, the Court expressed its concern with the question of the propriety of convening a Three-Judge District Court in this case. There was serious doubt in the minds of the Court that a substantial federal constitutional question was presented. In order to avoid the possibility of an invalid order it directed that "judgment dismissing the complaint be entered in the name of the three-judge court, at the same time certifying out of abundant caution that Judge Croake individually arrived at the same conclusion" that was reached by the Court collectively.

Trial Summary

The testimony at the trial revealed that both appellants, in preparing frozen stuffed turkeys for sale and distribution, processed them in a similar fashion. In substance, the turkeys are placed on an assembly line arrangement (R 48-54; 91-93) and as each turkey reaches a particular point in the line, an employee by means of a pressure device, stuffs each turkey with a prepared stuffing (R 55; 92). No attempt is made to determine the precise amount of stuffing that is injected into the cavity of each turkey (R 71; 95-99), as each cavity is filled to the limits of its capacity. The turkeys are not weighed prior to stuffing (R 70; 96) and the employee preparing the turkey is not limited or controlled in any way as to the amount of stuffing placed therein (R 71; 96). It is only after the stuffing process is completed that the turkeys are weighed, inspected and labeled (R 52; 79-93).

They are then placed in a plastic wrapper (R 52-53; 93) and six turkeys of various weights are placed in shipping containers (R 53; 93), frozen and stored (R 53; 93). Thereafter, in many cases without specific orders, (R 85) the frozen stuffed turkeys are usually shipped by rail directly to New York State (R 85). After the freight cars arrive, they are routed directly to a warehouse for unloading and storage. The frozen stuffed turkeys are subsequently sold pursuant to orders, to appellants' customers. After reaching the retail store they are removed from the original shipping container and individually offered for sale to the general public.

Attached to the complaint as Exhibits B and C (R 38, 39) are samples of the actual wrappers and labels allegedly approved by the Poultry Division of the United States Department of Agriculture. It is apparent, and must be conceded, that these labels only indicate the total net weight of the stuffed turkeys and fail to inform the public of the actual net weight of the turkey without the stuffing. Since the stuffed turkey is sold by the pound, the consumer is being charged the same price per pound for the stuffing and the turkey. It is obvious that the consumer in many instances is being misled by a label that merely states the *total* net weight of the stuffed turkey.

Appellants allege that pursuant to the regulations promulgated by the Poultry Division of the United States Department of Agriculture, the only label approved by said Division is one containing the total net weight of their frozen stuffed turkeys. Despite this contention there was proof adduced at the trial that the United States Department of Agriculture had earlier approved labels showing *separate* weights of stuffed rock cornish game hen and garnished hams (R 140-153).

The Trial Testimony of Specific Witnesses

The testimony of Charles Atkin (R 48-90), Superintendent of the Turkey Processing Plant of appellant Swift & Company, located at Detroit Lakes, Minnesota, dealt with the method of processing frozen stuffed turkeys for sale and distribution. He testified that the turkeys are brought into the plant, hung on conveyor chains or shackles, dressed, defeathered, eviscerated and then are placed in slush ice and water in a tank where they are chilled overnight. From there they go to the stuffing department and they are then packed in Cryovac bags and frozen (R 48-49).

When the bird is ready for stuffing it is washed thoroughly with sprayers, inspected and the cavity of the bird is sterilized by pressure and it is then brought to the stuffing machines. The stuffing is injected into the bird by a logger and moisture is added at the time the stuffing is added (R 52). It is then inspected to see that it is not overly stuffed and that the stuffing conforms to the general contour of the bird (R 52).

The bird then is placed on a conveyor and operators put giblets which have been packed in a foil package into the back of the bird, between the wings (R 52). It then goes to a machine which covers it with the Cryovac bag, the air is evacuated, the bird is weighed and placed in a shrinking tank which shrinks the bag that has just been placed upon them (R 53). It is then placed into a liquid freezer for 30 minutes and then goes immediately into a blast freezer (R 53). Under the present process, only one weighing is made after the bird is bagged with the giblets and dressing (R 57).

The witness testified that random tests are made to determine the kind of stuffing being inserted into the turkey be selecting a bird after it has been stuffed, taking it to the laboratory, removing the dressing and figuring the percentage of the dressing in the bird (R 58). There is a variance in the amount of stuffing that goes into the bird depending on the conformation of the bird and its cavity (R 59).

This witness described the activities of the U.S.D.A. inspectors in the plant, i.e., inspecting the plant, the machinery, and bag operation and the stuffing operation for sanitary purposes. This inspection is not done on any particular schedule, but every hour or two as the birds come off the line (R 59-60).

On cross examination Mr. Atkin testified that after the bird comes out of the ice water (R 67), it is drained by hanging the bird on the drain line. This takes approximately 6 to 8 minutes before it goes to an operator for stuffing. The stuffing is injected into the bird by a machine which automatically injects a percentage of water into the stuffing. At this point the operator does not know the weight of the bird. The stuffing machine consists of a stainless steel pipe about two inches in circumference activated by a switch which the operator steps on. This lets the water into the dressing and as the stuffing is inserted into the bird, it is stuffed so that the bird retains its natural appearance (R 70-71). The operator does not know how much stuffing goes into the bird; she merely puts the bird on the stuffing horn and as the stuffiing goes into the bird, it pushes itself off the horn so that if more pressure is exerted the turkey would receive more stuffing. A 5 pound bird would receive stuffing in the amount of 16 to 21% of the weight, a little over a pound. However, the machine is not regulated to give a particular percentage of stuffing. It is up to the operator (R 72-73). The stuffing machine ejects the stuffing at a constant rate but the amount of stuffing going into the bird varies depending on how the operator manipulates the bird (R 74).

No attempt was made to weigh the turkey more than once so that the turkey is only weighed after the stuffing, the bag and the giblets are all together (R 79). There was never any attempt, since 1955, when the stuffing operation started, to weigh a bird prior to stuffing nor was any test ever made to determine whether two weights were feasible (R 79-80).

Mr. Atkin stated that under the present processing system it takes 25 to 30 minutes from the time the bird is hung until it goes into the liquid freeze and it remains in the liquid freeze about 30 minutes. The birds are weighed before they are frozen at the rate of about 3 birds per minute (R 81).

After the bird is covered with the Cryovac bag and is sealed with the stuffing and giblets, it is weighed and the scaler marks the weight on the Cryovac bag with an indelible pencil allowing for the weight of the bag (R 82-83). It then goes into the liquid freeze tank and is frozen and that weight remains on the label until the bird is sold at retail (R 84).

When asked how many weighings would be required to show the net weight of the turkey and the total net weight of the bird including the giblets and stuffing, the witness answered two weighings or one more weighing than is now made (R 87). In connection with the time element involved in this extra weighing Mr. Atkin stated that while "there is a possibility of contamination" any time you handle any food product this was not a serious possibility should there be an extra weighing (R 89).

Mr. Russel Posegate, supervisor of poultry processing for Armour and Company, described the method employed by Armour to process frozen stuffed turkeys in their plant in Barron, Wisconsin (R 90-95).

Basically, the process is substantially the same as that used by Swift & Company. A Moyno Pump, which is a food type pump, is used to pump the stuffing into the bird. The bird is placed over the stainless steel pipe attached to the pump and the pump is controlled by a foot operated electric clutch type switch which starts and stops the pump. The bird is filled by holding it over the pump and as the stuffing is inserted, the bird pushes away from the pump (R 92). Approximately a pound and a half of stuffing goes into a 5 lb. bird and that possibly more stuffing might go into Armour turkey of the same size than the Swift turkey since the capacity of every 5 lb. bird is slightly different.

Any check on overstuffing is determined by those on the assembly line and an appearance check is made before the bird goes into the bag (R 102). It is up to the packer to determine the way he wants the bird packed, whether "solidly" or "lightly" (R 103-104).

Mr. Posegate testified that there is one weighing of the turkeys. They have two scales and the birds are weighed at the rate of a little over 300 an hour. He testified that if another weighing had to be made it would not affect the birds as far as wholesomeness or contamination are concerned (R 106), but that no test had ever been made of double weighing before or after they were stuffed.

William E. Hauver, Deputy Director of the Poultry Division of the Agricultural Marketing Service, U.S.D.A., testified for appellants. The poultry division is responsible for enforcement of the Poultry Products Inspection Act, and as Deputy Director Mr. Hauver coordinates and services the poultry inspection services.

He testified that the Poultry Products Inspection Act was designed as a consumer protective measure and is concerned with the wholesomeness of poultry (R 109). He described the process of obtaining U.S.D.A. approval of a label on a poultry product as follows: The applicant submits a proposed label, either an artists' sketch or a photo. It is reviewed by the Food Products Section and commented on either favorably or there might be some suggestion for some changes in the label prior to its approval. If there is an unfavorable comment a letter is sent to the applicant explaining why the label does not conform and suggestions are sometimes made to correct the objection. Final approval must be obtained before it can be used (R 110).

The witness testified that in looking at the label to determine whether it gets Department approval they look to see that it contains the necessary information stipulated in the law and look to see whether it contains false or misleading information. If a product is composed of several ingredients they look for the ingredient statement, the formulation, the method of processing, preparation of the product and if that is all in order they approve the label

(R 113). The purpose of formulation, examination and ingredient examination is quality, wholesomeness and prevention of adulteration (R 113).

The witness testified that the Swift label was not approved because:

> "The net weight shown in the manner proposed would be confusing to the consumer. Furthermore, this type of net weight duplication would require two weighings. The initial weight of the turkey would have to be kept on turkey until it was stuffed, packaged and reweighed. The confusion which might result from such a procedure could result in improper weights being shown on the product." (R 114)

A letter from Dr. Robert J. Lee, head of the Poultry Product Section, who handles label approvals, addressed to Swift & Company explained that the label was rejected because the U.S.D.A. does not allow dual weights because of the impracticability of checking on it accurately (R 115).

The application by Armour and Company for approval of a label showing two weights was also disapproved by the Department (R 116). Mr. Hauver testified that it is the policy of the Department to permit only a single net weight on any combination poultry product.

Evidence was adduced that the Department had given temporary approval to a label showing dual weights with respect to cornish game hen, submitted by Idlewild Farms in Connecticut (R 118). The witness testified that the Department would not permit a retailer in New York State to add to the label showing one weight an additional weight, namely that of the turkey. Judge Croake asked whether there was any procedure for appeal within the Department and the witness answered yes but that no such appeal was taken in this case (R 121).

When questioned as to what was wrong with double weighing, the witness testified that there are too many opportunities for confusion and mixups in carrying the weight of the raw bird through the entire processing line and the calculations might result in wrong weights being applied but that no test as to this possibility had been made (R 129) nor did the U.S.D.A. ask Swift and Armour to make such a test (R 130).

Mr. Hauver stated net weight was not defined in the regulations or in the Act but is the interpretation of the U.S.D.A. (R 135). No attempt was made by the U.S.D.A. to compromise the difference between the Federal and New York State net weight provisions (R 136), despite the fact that the Act specifies that the U.S.D.A. shall cooperate with State officials in the enforcement of the Poultry Inspection Act (R 136).

This witness testified that perhaps this should have been done but it was not done in this case and that the U.S.D.A. is not interested specifically in declaring the State statute unconstitutional (R 137).

When asked by Judge Friendly, who in the Department participated in the determination to disapprove labels showing separate weights when Armour and Swift submitted them, Mr. Hauver testified that the Food Products Section, Poultry Inspection Branch, the director's office, the witness and the witness' superior and possibly general counsel for the Department. It did not go to the Assistant Secretary or any similar level (R 167-168).

Judge Friendly then asked why couldn't a tag or something be stuck on the bird at the time it was weighed before stuffing and remain with the bird until the final weighing. The witness stated that if it were securely affixed this is a possibility but there are too many areas where error might develop and it would be hard to check because when you check on the finished product it has to be defrosted to remove the stuffing and weigh it (R 168). However, the court pointed out that they could weigh the bird before it was frozen and therefore they wouldn't have to defrost it later. The witness stated that it would require a man there all the time just checking the weight. They did not have such staff available (R 169). The witness admitted, in answer to a question, that it might be possible that the Department could decide in the future that two weights might be permissible.

In response to a question by Judge Croake that if the federal regulation was the same as the state, could means be found to protect the consumer, this witness said that if such was the case we would have found the way to check it out to our specification in order to reasonably verify the accuracy of the weight statement.

Prior to 1963, when New York State's weight regulation went into effect, the annual increase in the sale of stuffed turkeys by appellants in New York was as follows (R 216-217):

SWIFT & COMPANY

Stuffed Turkey

1960—	167,000 lbs.
1961—	105,000 lbs.
1962—	142,000 lbs.

ARMOUR & COMPANY

Stuffed Turkey

1960—	269,000 lbs.
1961—	367,000 lbs.
1962—	524,000 lbs.

John F. Madden, Director of the Bureau of Weights and Measures of the Department of Agriculture and Markets of the State of New York testified on behalf of appellee. Mr. Madden testified that § 221.40 of the Regulations promulgated pursuant to § 193 of the Agriculture and Markets Law requires that the total weight of the turkey and the combined total weights of the product be stated on the label (R 221) and that the local sealers acted on their own in enforcing this separate weight provision (R 223).

On cross-examination Mr. Madden testified that his position as director of Weights and Measures is to make sure that the laws relating to weights and measures are enforced in New York and that his inspectors spot-check weights in various counties to determine whether this is being accomplished (R 224). Section 180 of the Agriculture and Markets Law provides that the Commissioner shall promulgate rules and regulations and issue instructions to county sealers and these shall be binding upon the sealers (R 224).

Whenever a spot-check by Mr. Madden's inspectors reveals that the law is not being enforced in a particular area, the inspectors report this to Mr. Madden who personally confers with the local governing body, submits reports of findings to the body and asks them for cooperation in seeing that the laws are enforced in that jurisdiction (R 225).

Mr. Madden testified that on March 1, 1964 Regulation 221.9(c) became effective. This regulation is similar to 221.40 except that the words "at retail" are omitted (R 226). However, there is no change in the interpretation of the law with respect to stuffed turkeys and the application of single or multiple weights (R 228). The principal change made by the new regulations is that they apply to both retailers and wholesalers.

Although Mr. Madden stated that stuffed turkeys in a frozen state, would have to be thawed first in order to check their weights and that therefore an inspection is impractical; when questioned further he stated he meant that it would require a little more work in his department and he would therefore need more money in the budget to buy stuffed turkeys in order to inspect them and more men. In that respect his department had the same trouble as the U.S.D.A. (R 237). He stated there is no question that testing can be made to determine the weight of birds and the weight of the stuffing (R 237). Mr. Madden testified that the State would have no objection to having a label on the turkey that would comply with both the state and federal requirements.

Esther E. Hendler, Senior Inspector, New York City Bureau of Weights and Measures, Department of Markets testified on behalf of the appellee. Mrs. Hendler is assigned to a special investigative squad of consumer frauds in relation to weights and measures and misleading advertising. She made a complaint against Swift & Company and a retailer—Trunz—in 1962, resulting in a criminal conviction for violation of the N. Y. State Regulation with respect to frozen stuffed turkeys (R 241-242).

She stated that an advertisement appeared in a New York daily newspaper on or about April 18, 1962 advertising stuffed Butter Ball Swift turkeys at 39¢ a pound (R 241). She went into one of the retail stores to check on the weight and there was no separate weight stated on the turkey with respect to the stuffing and the net weight of the bird.

She purchased two stuffed turkeys, one of which was a Swift turkey marked 7 lbs. 4 oz. including dressing. One was labeled 7 lbs. 9 oz. One turkey was left as is and the one marked 7 lbs. 4 oz. was examined back at her department (R 242). Upon examination, she testified, the bread stuffing enclosed in the turkey weighed 2 lbs. 2 oz. and the turkey itself 5 lbs. 2 oz. She said that at the state criminal trial the defendants there attempted to prove that poultry was not meat. Both defendants were found guilty of violating the State statute which is enforced in the City of New York by the New York City Bureau of Weights and Measures of the Department of Markets. No appeal was ever taken from that conviction (R 244).

She testified that the bird was packed extremely tight with stuffing and that in her opinion the average housewife would not pack stuffing so tightly and that while the bird contained 2 lbs. 2 oz. of stuffing she claimed that the normal amount should have been about ½ of that.

Summary of Argument

I

Appellee maintains that a three-judge court was improperly convened below and that consequently a direct appeal to this Court was not authorized.

Both the Federal and State enactments upon which the present controversy arises, contain the critical term "net weight." The conflict results only from an alleged difference in interpretation of that term by the State and Federal officers. Clearly, "If in immediate controversy is not the unconstitutionality of a state law but merely the construction of a state law or federal law, the three-judge requirement does not become operative." *Kesler* v. *Department of Public Safety,* 369 U. S. 153, 157. Moreover, a claim that a state law is inoperative because of a federal statute which allegedly preempts it does not require the convening of a three-judge court, *Cace* v. *Bowles,* 327 U. S. 92, 97. Further, although a three-judge court may be convened where a non-constitutional claim is joined in the complaint with a valid constitutional contention, *Florida Lime & Avocado Growers* v. *Jacobsen,* 362 U. S. 72 the constitutional claim must be a substantial one. *California*

Water Service Co. v. *City of Redding,* 304 U. S. 252, 254. The Court below summarily dismissed as insubstantial appellants' alleged constitutional assertions under the Fourteenth Amendment and the commerce clause. Accordingly, the three-judge court was improperly convened and the direct appeal to this Court should be dismissed.

II

The New York Agriculture and Markets Law is not preempted by the Federal Poultry Products Act. The New York statute, as the Court below found, was enacted for the "protection of the public against false weights and measures . . ." and accordingly was a valid exercise of New York police power in the field of state inspection laws. *Patapsco Guano Co.* v. *Board of Agriculture of North Carolina,* 171 U. S. 345. The federal statute, on the other hand, is concerned only with the wholesomeness of the poultry product, 21 U.S.C. 451 *et seq.* In the absence of a direct and irreconcilable conflict between fedeal and state statutes preemption does not attach. *Head* v. *New Mexico,* 374 U. S. 424, 430.

Both the federal and state statutes, as noted earlier, require exhibition of the products "net weight" on the poultry container. According to the interpretation of a subordinate official of the Federal Department of Agriculture the term "net weight" is to be read as total net weight of the bird and the stuffing. The State's requirement of "net weight", in its statute, has been interpreted to mean that that the container must show a separate statement of the net weight both of the unstuffed bird and of the stuffed bird. The Court below found that this "was an admissible interpretation of the [state] regulation." On the other hand the alleged federal interpretation of the "net weight" term in the federal statute scarcely is entitled to such finding since the sole determination of the federal "interpretation" is based upon the action of a subordinate federal official. Yet, review of the federal disapproval of appellants' submitted label (in conformance with the New York requirement), not sought by appellants either in the statutorily defined administrative procedure for a federal departmental hearing or by a subsequent appeal to the United States Court of Appeals, 21 U.S.C. 457. The cases holding that an aggrieved party must exhaust his administrative remedies are relevant here where the statute specifically provides for a departmental hearing with subsequent judicial review before the federal disposition can be accorded the finality and weight contended for by appellants. *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41; *Federal Power Commission* v. *Arkansas Power & Light Co.,* 330 U. S. 802, *reversing per curiam,* 156 F. 2d 821 (D. C. Cir.).

In addition, there is nothing in the federal statute requiring national uniformity of that term so as to indicate that it was exerting exclusive jurisdiction to exclude the state from promulgating its own "net weight" requirements. Indeed the opposite is true. There is graphic evidence, in the record, to indicate that even the federally accepted labels of appellants' products are variant in composition of their "net weight" legends, thus negating any contention that uniformity of "net weight" is required by the federal statute. Moreover, it is noteworthy that the applications forms provided by the Federal Secretary of Agriculture for label approval contains a notation that "any approval of or comment concerning this labeling material or the wording thereon . . . does not excuse failure to comply with other applicable Federal or State laws . . ." Where, as here, a state demands a higher standard for protection of its consumers than that required by federal law, the state law is not rendered unconstitutional. *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 152. Rather, New York's statute properly "embodies a traditional state interest" in the protection of its citizens against fraud and deception and should be accorded great respect. *Rice* v. *Sante Fe Elevator Corp.,* 331 U. S. 218, 230. The appellant's poor control methods of stuffing their turkeys as evidenced by the testimony at the hearing below highlights the state's justifications for the police power protection accorded its citizens in the New York Agriculture and Markets Law.

III

The state enactment does not place an undue burden on interstate commerce. The states may legislate with respect to "the protection of the people against fraud and deception in the sale of food products" although such matters may, in some measure affect interstate commerce." *Plumley* v. *Massachusetts,* 155 U. S. 461, 472. The only permissible constitutional limitations on this exercise of the state's police power are where such legislation discriminates "against interstate commerce or operate[s] to disrupt its required uniformity. *Huron Portland Cement Co.* v. *City of Detroit,* 263 U. S. 440, 448. Neither of the accepted limitations apply here.

Appellants have wholly failed to show that New York's statute prefers, in any respect, New York processors of stuffed turkeys over appellants. Moreover, as the Court below found, New York's requirement of the supplemental information on separate weights of turkey and stuffing, which would be satisfied by an additional label or tag, does not result in any actual or undue burden on interstate commerce. Furthermore, as discussed earlier, there is no attempt by appellee to disrupt any federal policy of national uniformity on poultry labelling since no such policy exists. Finally, it must be observed that the state regulations regulate retail sales of goods at rest within its borders. See *Schecter Poultry* v. *United States,* 295 U. S. 495. Accordingly, there is no such regulation of interstate commerce by appellee that would amount, under any circumstance, to an undue burden on interstate commerce by appellee.

IV

New York State's regulation as construed by appellee is neither arbitrary nor discriminatory, is applied equally to all processors and does not deny appellants the due process and equal protection provisions of the Fourteenth Amendment.

POINT I

The statutory Three-Judge District Court was improperly convened since appellants' complaint presented no substantial federal constitutional question but only a question of statutory construction. Direct appeal to this Court was not authorized.

A.

The appellants commenced this action in the District Court seeking a declaratory judgment prohibiting the appellee from interpreting the regulation containing the term "net weight" as set forth in the Agriculture and Markets Law of the State of New York § 193, to require a statement of the net weight of the unstuffed turkeys as well as of the stuffed birds. They alleged that appellee's interpretation of that term is in conflict with the interpretation of the identical term, "net weight", prescribed by the Federal Poultry Products Inspection Act, 21 U.S.C. § 451 *et seq.* The complaint further alleged that § 193 of the New York Statute violates appellants' rights under the commerce and supremacy clauses of the Federal Constitution and the due process and equal protection clauses of the Fourteenth Amendment.

Appellants requested that a three-judge court be convened pursuant to 28 U.S.C. § 2281 to hear and determine the case. District Judge Croake, over objection of the appellee, believing that the case might be within the purview of that statute, assembled the statutory court. The decree of the three-judge court, out of "abundant caution", dismissed the complaint in the name of the three-judge court and at the same time certified that Judge Croake "individually arrived at the same conclusion that [was] reached collectively" (R 392).

This Court postponed consideration of the question of its jurisdiction of the direct appeal to the hearing on the merits. 379 U. S. 997.

The initial question, therefore, to be determined is whether this Court has jurisdiction under 28 U.S.C. § 1253 to consider the merits of this appeal taken directly from the decree of a three-judge court. Appellee contends that the case is not one for a statutory three-judge court convened pursuant to 28 U.S.C. § 2281 and that consequently this case cannot be brought here on direct appeal. *Bailey* v. *Patterson*, 369 U. S. 31, 34.

It is clear that the purpose of 28 U.S.C. § 2281 is to protect state sovereignty. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368. That statute is not to be viewed "as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." *Kesler* v. *Department of Public Safety*, 369 U. S. 153, 156. See also, *Phillips* v. *United States*, 312 U. S. 246, 250-251. Moreover, it has been held by this Court, on numerous occasions, that a disputed *substantial* federal question on constitutional grounds must be presented in order to properly convene a three-judge court. See *e.g., Bailey* v. *Patterson, supra*, at 33.

We must now consider the nature of the present cause of action and the relief sought by the appellants in the light of these broad stated principles. *Wilentz* v. *Sovereign Camp*, 306 U. S. 573, 576.

B.

Appellants' allegation that appellee's interpretation of the New York "net weight" requirement is at variance with the Department of Agriculture's interpretation of that term as found in the Federal Act, is not a proper ground under 28 U.S.C. § 2281 for convening a three-judge court. Thus, "If in immediate controversy is not the unconstitutionality of a state law but merely the construction of a state law or the federal law, the three-judge requirement does not become operative." *Kesler* v. *Department of Public Safety, supra* at 157. This view was repeated in *United States* v. *Georgia Public Service Comm'n,* 371 U. S. 281, 287.

Similarly, in *Ex Parte Bransford,* 310 U. S. 354, this Court held that a three-judge court is not required where the issue was "merely the construction of an Act of Congress, not the constitutionality of the state enactment." *Id.* at 359.

Plainly, the thrust of appellants' contention is not directed toward a showing that the state statute is unconstitutional, since the identical term "net weight" is found in both the state and federal enactments. It is apparent that appellants must rather rely on the variant interpretations placed upon "net weight" by the federal and state authorities and argue therefrom that the federal act preempts the state legislation. This again presents no ground for convening a three-judge court.

This Court has repeatedly held that where the state statute is alleged to be inoperative because of a federal statute which preempts it, a single district court Judge may hear the case. *Case* v. *Bowles,* 327 U. S. 92; *Ex Parte Buder,* 271 U. S. 461; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50. See also *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U. S. 73 (by implication); Annot. Three-Judge Court, 4 L. Ed. 2d 1931, 1962 (1960). In *Case* v. *Bowles, supra,* this Court pertinently observed that a three-judge court was not required for example, where "the complaint did not challenge the constitutionality of the state statute but alleged merely that its enforcement would violate the Emergency Control Act." *Id.* at 97.

Here the Court below was presented not with "a sole immediate constitutional question" requiring a three-judge court, but with "issues of statutory construction" which would perhaps eventually lead to a constitutional question. *Kesler* v. *Department of Public Safety, supra* at 158. Consequently, a three-judge court was improperly convened below and no direct appeal to this Court lies from the District Court decree.

C.

Appellants' contentions under the commerce clause and the Fourteenth Amendment similarly did not require a three-judge court. The mere recitation of an alleged constitutional violation in a complaint is insufficient to mandate a statutory Court; substantial federal constitutional questions must be raised. *California Water Service Co.* v. *City of Redding,* 304 U. S. 252, 254. The lack of substantiality in a federal constitutional question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of the Court as to foreclose the subject. *California Water Service Co.* v. *City of Redding, supra* at 255. The Court below held that appellants' claims that "application of the New York Statute violates the commerce clause or the Fourteenth Amendment are insubstantial . . ." *Swift & Co. Inc. et al.* v. *Wickham,* 230 F. Supp. 398, 409. Indeed, the decision below pertinently observed that appellants' "claims under the Fourteenth Amendment are so patently baseless that we mention them only to show they were not overlooked." *Swift & Co., Inc. et al.* v. *Wickham, supra* at 403. In this setting, the appellants are unable to bring this action within any of the accepted requirements for the convening of a three-judge court.

D.

Appellants now contend that the three-judge court was properly convened on the authority of this Court's decision in *Florida Lime & Avocado Growers* v. *Jacobsen,* 362 U. S. 73. That case held that the three-judge court must be assembled even where a non-constitutional attack is joined in the complaint with a constitutional one. This principle is not pertinent here where the appellants' only constitutional claims under the commerce clause and the Fourteenth Amendment are so clearly insubstantial. A three-judge court was not required to hear and determine such claims. *Ex Parte Buder,* 271 U. S. 461 (cited in *Florida Lime & Avacodo Growers, supra* at 82).

E.

Appellants' final contention is that once a hearing has been held pursuant to 28 U.S.C. § 2284 the question of the District Court's jurisdiction cannot be challenged. This argument is erroneous since the issue is not the intention behind § 2281 but rather whether there exists jurisdiction for this Court to hear a direct appeal pursuant to 28 U.S.C. § 1253. The sole determination to be made in connection with the jurisdiction of this Court here is whether a three-judge court was properly convened below. Section 1253 makes direct appeal available only when a three-judge court is "required by any act of Congress" (28 U.S.C. § 1253). The mere fact of the assemblage of the statutory court did not in and of itself authorize the direct appeal to this Court. Thus, in *Wilentz* v. *Sovereign Camp,* 306 U. S. 563, a three-judge court was convened and the court, after a hearing, rendered its final decree. In this Court the objection was pressed that the three-judge court was erroneously constituted and that a direct appeal to this Court did not lie. This Court observed that there "the issue is not one of jurisdiction of the district court as a federal court . . . [citation omitted], but whether a final hearing by three judges is prescribed by the sections and hence whether this Court has jurisdiction to hear the appeal. *Smith* v. *Wilson*, 273 U. S. 388.'' *Id.* at 582.*

POINT II

The New York Agriculture and Markets Law enacted pursuant to the state police power is a valid inspection law designed to protect its citizens against false weights and measures. The declared scope and purpose of the federal Poultry Products Act, on the other hand, is concerned only with the wholesomeness of the poultry product. Moreover, since there is no showing that Congress here intended to preempt the field of weight labeling, the New York statute and regulation is not superseded by the federal enactment.

As the Court below stated ''[p]rotection of the public against false weights and measures or misleading statements about them is one of the oldest exercises of governmental regulatory power'' (R 379) and that ''there could hardly be a fitter subject for state inspection than weights, see *Patapsco Guano Co.* v. *Board of Agriculture of North Carolina*, 171 U. S. 345, 358, 361.''** We must therefore start with the assumption that this historic power of state inspection and regulation of weights is not to be superseded by the Poultry Products Inspection Act, 71 Stat. 441, 21 U.S.C. 451 *et seq.* (appellants' Appendix ''A'') unless the purpose of Congress to do so is clear. *Napier* v. *Atlantic Coast Lines RR Co.*, 272 U. S. 605, 611; *Allen-Bradley Local* v. *Wisconsin Employment Bd.*, 315 U. S. 740, 749.

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* The appellants have timely filed a notice of appeal to the United States Court of Appeals for the Second Circuit and their remedy would be properly preserved by dismissing the appeal to this Court. See *Wilentz* v. *Sovereign Camp*, 306 U. S. 573, 578.

** The constitutionality of New York State's Agriculture and Markets Law has been upheld as being within the state police power. *People* v. *West*, 106 N. Y. 293; *People* v. *Kibler*, 106 N. Y. 321.

It is appellants' position, which was rejected by the District Court, that Congress, in passing the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), preempted the entire field of poultry labeling so as to preclude the State of New York, in the exercise of its police power, from imposing additional weight labeling requirements for the protection of its consumers.

In considering the question of preemption the intention of Congress to exclude the state from exercising its police power must be clearly manifested. *Napier* v. *Atlantic Coast Line, supra.* The decisions of this Court have consistently held that state statutes, otherwise valid, must be upheld unless the conflict is so direct and positive that the two cannot stand together or be reconciled or there is persuasive evidence of congressional design to preempt the field. *Head* v. *New Mexico Board*, 374 U. S. 424, 430; *Florida Avocado Growers* v. *Paul*, 373 U. S. 132, 141; *Kelly* v. *Washington*, 302 U. S. 1, 10; *Rice* v. *Sante Fe Elevator Corp.*, 331 U. S. 218, 230; *California* v. *Zook*, 336 U. S. 725, 729; *Huron Cement Co.* v. *Detroit*, 362 U. S. 440. Identity of purpose between federal and state statutes does not mean automatic invalidity of state measures. *California* v. *Zook, supra* at p. 730; *Colorado Anti-Discrimination Commission* v. *Continental Air Lines*, 372 U. S. 714. On the contrary, federalism in its practical operation, favors survival of the reserved authority of the state over matters that are the intimate concern of the state unless Congress has clearly withdrawn all state authority or the state's claim is in unmistakable conflict with what Congress ordered. *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U. S. 767; *DeVeau* v. *Braisted*, 363 U. S. 144.

A.

The construction of the Poultry Products Inspection Act clearly reveals that Congress was only concerned with the marketing of wholesome, unadulterated poultry products.

The legislative findings (Sec. 2), the Congressional purpose and declaration of policy set forth in § 3, and the entire structure of the act, indisputably show that it was not the intention of Congress to "supplant all the detailed state regulation of [weight labeling] practices, particularly when the grant of power to the [Secretary of Agriculture]", *Head* v. *New Mexico Board,* 374 U. S. 242, 431, was obviously for purposes of assuring the wholesomeness of poultry products.

It is, we submit, impossible to see how a state labeling law seeking to provide additional information to its consumers as a guard against deception can in any manner frustrate or interfere with the purpose of the federal statute, nor is there anything in the statute itself or in any judicial construction of such federal statute that supports a theory of Congressional intent to preempt the field of regulation here in issue.

The federal act became effective in 1957, approximately fifty years after New York State first passed laws governing the sale of poultry and meat. The legislative findings enumerated in § 2 of that act deal with marketing of wholesome poultry products and declare this to be affected with the public interest. The policy of Congress as declared in § 3 is to prevent the movement in interstate or foreign commerce or in a designated major consuming area, of poultry products which are unwholesome, adulterated, or otherwise unfit for human food. Neither the legislative findings nor the declaration of congressional policy refer to the question of weights.

Section 4 defines important terms of the act but again no reference is made to the term "net weight". Section 5 authorizes the designation of major consuming areas within federal control.

Section 6 provides for inspection of poultry before and after slaughtering for the "purpose of preventing the entering into * * * a designated major consuming area of any poultry product which is unwholesome or adulterated * * *". A provision obviously designed to protect consumers from adulterated foods, not incorrect weights. Similarly, the provisions of § 7 also deal with wholesomeness being, concerned with sanitation, facilities and sanitary practices.

Section 8 entitled Labeling defines the items that must be included on the label of the shipping container and the immediate container. These include the official inspection mark, the approved plant number, the name of the product, a statement of ingredients and the "net weight or other appropriate measure of the contents". In the entire act containing over 20 sections, this is the only section where the necessity for disclosure of net weight is used. Approval by the Secretary of Agriculture of the written, printed or graphic matter upon or accompanying the poultry is also provided for in Section 8. The remaining sections deal with prohibited acts, methods of enforcement, penalties, reporting of violations, exemptions, imports, etc.

Read in the light of the purposes of the federal statute as set out in the statute, the provision for the statement on the label of "net weight" is clearly intended to guard against the adulteration of the poultry product after the inspection. Any other purpose would appear to be wholly alien to the language in Section 6.

Federal regulation 7 C.F.R. Section 81.130(a)(3) provides that the net weight that must appear on the immediate container of any poultry product is the net weight of the poultry product and excludes the weight of direct packaging or giblet wrapping materials. *However, this section of the* *regulations even permits the Secretary of Agriculture to approve labels which do not have imprinted the "net weight" of the product, so long as the retailer or distributor of the product "agrees in writing to the administrator to mark the true net weight on the label prior to display and sale thereof."*

The lack of concern for uniformity in the federal "net weight" requirements is graphically illustrated by examining the weight legends that appear on each of appellants' labels (Appellants' Exs. B and C, R 38-39). Armour's label approved by the United States Department of Agriculture merely refers to the net weight of the product, nothing more. The Swift label, similarly approved by the United States Department of Agriculture, indicates net weight and the words "including dressing". The only uniform requirement on both approved labels is the stamp of the United States Department of Agriculture marked "inspected for wholesomeness". Yet, despite the fact that one label indicates that net weight includes the dressing and the other bears no such statement, both labels were approved by the federal department. This clearly indicates the lack of uniformity and concern for net weight requirements within the Poultry Inspection Division of the United States Department of Agriculture and the true purpose to protect the inspected poultry from subsequent adulteration.

Nothing in the federal statute precludes the supplementary information required by New York. Indeed, § 18(b) of the Poultry Products Inspection Act, providing that in carrying out the provisions of the statute the Secretary may cooperate with state agencies, shows that Congress specifically invited the Secretary of Agriculture to cooperate with the State agencies and did not, by the statute, preclude State requirements.

Furthermore, it is evident that the Secretary of Agriculture also recognized that the form and content of the federally approved label was subject to additional state and local governmental regulations, since at the foot of the face of the application for label approval appears the following notice (Appellants' Exhibit 5, R 273-276):

> "Any approval of or comment concerning this labeling material or the wording thereon as contained in this Notice must be understood to represent the attitude of this Service only, and does not excuse failure to comply with other applicable Federal or State laws, or city or municipal regulations."

This clearly indicates that the federal government was not asserting exclusive jurisdiction so as to exclude the state from promulgating its own net weight requirements.

Thus, as the Court below pointed out: "The House Report, No. 465, 85th Cong., 1st Sess., 1957; 2 U. S. Code Cong. & Adm. News, 1957, pp. 16, 32-33, and the Senate Report, No. 195, 85th Cong., 1st Sess., 1957, say nothing on the subject save for a passing mention of a statement of "the quantity" in paraphrasing the labelling section where this clause appears" (R 387). Accordingly, it is manifest that in enacting this law, Congress did not have in mind the exclusive control of weight labelling when it used the term "net weight" in one short clause in the entire statute.

B.

There is no irreconcilable conflict between New York requirements and the federal requirements.

The New York State statute, § 193-3 of the New York Agriculture and Markets Law provides:

> "All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the Commissioner."

State regulation 221.40, in effect at the commencement of this action provides:

> "Meat, poultry and fish shall be sold or offered for sale as food at retail by net weight only."

This state regulation 221.40 was superseded by 221.9(c), effective March 1, 1964, which provides:

> "(c) *Meat, poultry and fish.* Except for immediate consumption on the premises where sold or as one of several elements comprising a ready-to-eat meal sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat food products, poultry (whole or parts) and all seafood except shellfish, offered or exposed for sale or sold, as food shall be offered or exposed for sale and sold by net weight. The meaning of the words meat and meat food products as used in this section is that defined in Section 96-g of the Agriculture and Markets Law."

At the conclusion of the trial appellants moved to amend their complaint to include reference to regulation 221.9(c) and such motion to amend was granted by the Court (R 248, 249).

The New York Director of Weights and Measures has interpreted this regulation to require that labels on frozen stuffed turkeys separately indicate the weight of the turkey and the total net weight of the combined product, i.e., the turkey and stuffing together (R 221). As the court below noted:

> "The history of the regulation, promulgated after a hearing by the Commissioner to consider an alternative containing an exception 'that stuffed poultry, when plainly labeled as such and with the words "including stuffing" appearing as part of the net weight marking of the combined poultry and stuffing

> may be sold or offered for sale by the net weight of the combined poultry and stuffing', leaves little doubt that this was an admissible interpretation of the regulation. We are also confident that, in view [fol. 530] of the lack of statutory definition of 'net weight', the New York courts would hold a regulation having this effect to be within the authority conferred on the Commissioner specifically by § 193-3 and more generally by 196-a. See Mounting & Finishing Co. v. McGoldrick, 294 N. Y. 104 (1945)." (R 378)

Neither the Poultry Products Inspection Act nor the regulations promulgated thereunder specifically preclude appellants from complying with the New York State weight requirement. Appellants consequently appear to base their entire case on the decision of a subordinate official who refused to approve labels submitted by appellants which *allegedly* conformed with appellee's regulations. The reasons for disapproval are set forth in a letter (R 283-284). The District Court found no valid basis for rejection of appellants' proffered labels. The trial testimony of appellants' own witnesses irrefutably established that the rejection was capricious; that the extra weighing would have no adverse effect on the wholesomeness of the turkey (R 106). The other objections were dismissed by the court as trivial. The question of a supplementary label or tag was not considered by these subordinate federal officials; no notice was given to New York by these officials or appellants so that the "cooperation" referred to in the federal statute could be accomplished.

The arbitrary and inconsistent position taken by the Poultry Inspection Division of the Department of Agriculture in this respect, is further illustrated by reference to the fact that permission had been given (though later revoked just prior to the trial of this action) by the Agriculture Marketing Service of the federal Department of Agriculture to processors of garnished ham and rock cornish game hen to show two weights on their labels. In fact, Mr. Hauver, the Deputy Director of the Poultry Division conceded that his department's policy regarding a single weight was not irrevocable and indeed, that with more help and funds for supervision, the department could approve a label setting forth two weights (R 169-170).

Appellants' repeated references in their brief to the testimony of the State witness, John Madden, Director of Weights and Measures of the State of New York, to the effect that enforcement of the State requirement was impractical, does not present Mr. Madden's complete views on the subject because he also said that with a larger budget and more man-power New York State's requirement with respect to weights could readily be supervised and enforced (R 237).

Based upon this arbitrary unsupported determination by a subordinate official in the Poultry Products Section, appellants contend that an actual conflict exists between the state and federal weight regulations and consequently the State must give way to federal supremacy. But this is not so. The test is whether as a practical matter "both regulations can be enforced without impairing the federal superintendence of the field * * *." *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U. S. 132, 142. "A conclusion that the state regulation is ousted by the federal requires, * * * a showing of conflict either in purpose or in operation between the state and federal regulations involved". *Head* v. *New Mexico Board, supra,* at 445.

In applying this test the Court below found no conflict in purpose or operation nor any congessional mandate in the statute preventing the two regulations from existing side by side. The Court concluded that merely because the Secretary of Agriculture is empowered to interpret the term "net weight", "this alone would not outlaw further statements concerning weight [by New York] so long as these do not obscure or detract from the force of the federally approved label and so long as they are not presented so as to imply federal approval" (R 389). There is no reason to say that Congress in passing the Statute and providing for the federally approved label intended to bar the states from protecting consumers by requiring additional information. Under the circumstances the difference between the view of the subordinate federal official never presented to the Secretary of Agriculture or any of his Assistants and the State Commission of Agriculture, if any, is far from irreconcilable as the Court pointed out, and as a practical matter there is no reason why both regulations cannot be enforced without impairing federal supervision.

If there is any inconsistency it is not in the statutes themselves. It arises as a result of a letter from a subordinate federal official who, *ex parte* as it were, determined that New York's requirements would be misleading, an assumption which was disowned, by appellants' own witnesses at the trial and found by the District Court to be contrary to the fact (R 387). Where, as here, the structure of the statute and regulations does not manifest a clear intention on the part of Congress to preempt the field, an arbitrary determination by a minor employee under such circumstances cannot be used to spell out such congressional intention so as to form the basis for barring the application of a New York statute. As this Court stated in *Head* v. *New Mexico Board,* 374 U. S. 424, 431-432:

> "In the absence of positive evidence of legislative intent to the contrary, we cannot believe Congress has ousted the States from an area of such fundamentally local concern."*

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* Appellants failed to seek a departmental hearing in accordance with 21 U.S.C. § 457(b), 7 C.F.R. § 81.130(c), at which all pertinent facts could have been presented and New York could have been represented. The District Court under the circumstances regarded the action of the subordinate federal official as not constituting any basis for the argument of federal preemption, stating that "[W]e

(Footnote continued on following page)

C.

The exercise of the police power of the State of New York through the Agriculture and Markets Law is reasonably designed to afford the consumer necessary protection against false weights and measures.

It is obvious that compliance with the state requirements gives the consumer more necessary information and thereby enables a purchaser of stuffed turkey to determine how much she is actually paying per pound. Because a state requires a higher standard for the protection of its consumers than that required by federal laws does not necessarily render the state law unconstitutional. *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148, 162. It is apparent that the New York law is designed to protect its consumers against fraud and deception with respect to weights. As Mr. Justice Brennan stated in his concurring opinion in *Head* v. *New Mexico Board,* 374 U. S. 424, 445, in discussing a New Mexico law designed to protect its consumers against improper advertising:

> "Such legislation, whether concerned with the health and safety of consumers, or with their protection against fraud and deception, embodies a traditional state interest of the sort which our decisions have consistently respected. *Rice* v. *Sante Fe Elevator Corp.,*

(Footnote continued from preceding page)

think it highly unlikely that upon a departmental hearing, with New York given the notice that proper respect to its authority would demand, anyone could reasonably find that a separate statement of the weight of the unstuffed bird would be false or misleading" (R 390). Cases holding that an aggrieved party must exhaust his administrative remedies such as *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41 and *Federal Power Commission* v. *Arkansas Power and Light Co.,* 330 U. S. 802, *reversing per curiam,* 156 F. 2d 821 (D. C. Cir.); are relevant here where the statute specifically provides for a departmental hearing with subsequent judicial review before the federal disposition can be accorded the finality and weight contended for by appellants.

331 U. S. 218, 230. Nor is such legislation required to yield simply because it may in some degree restrict the activties of one who holds a federal license. *Cf. Huron Portland Cement Co.* v. *Detroit,* 362 U. S. 4401, 447-448."

The need for consumer protection by New York was made abundantly clear at the trial. Mrs. E. Hendler, Senior Inspector of the New York City Bureau of Weights and Measures, Department of Markets, testified that she purchased a frozen stuffed turkey processed by one of the appellants and marked as weighing seven pounds four ounces (R 242). After thawing and weighing she found that the bread stuffing in the turkey weighed two pounds two ounces and the meat weighed five pounds two ounces (R 43); that the stuffing was "crammed in"—"extremely packed, tightly packed" (R 244) and that approximately one-half this amount of stuffing would be normal for a bird that size (R 245). Surely, under such circumstances, a label complying with federal requirements bearing only the total weight of the combined product would be misleading to the consumer and fail to provide her with the information needed to intelligently decide whether she is making a wise purchase with respect to price as well as quantity.

Appellants' method of stuffing turkeys highlights the need for more detailed information with respect to weights, than that required by the Secretary of Agriculture. There is no control over the amount of stuffing that goes into each bird (R 59, 71; 95-99). The weights of the birds vary as much as two pounds on a particular "run" on the assembly line (R 65). The stuffiing is merely inserted into the bird by a pressure device and the operator inserts as much stuffing as the cavity of the bird will take in order to conform to the natural configuration of the bird (R 71-96). Clearly this is a hit and miss process with no attention paid to the proper amount of stuffing needed for the particular weight of the individual turkey—something to which a housewife pays particular attention.

While the federal Department of Agriculture undoubtedly is well versed in the elements that are necessary to assure wholesomeness in foods, the record establishes no statutory obligation or steps to protect the consumer in this area of informing consumers of the weights of the constituents so as to guard against deception of the consumers. New York State is in the forefront of consumer protection and its Department of Agriculture is charged with the responsibility of such protection. In protecting the consumer in this area New York is in accord with the views on truth in consumer packaging as expressed by the Joint Economic Committee of Congress in its report to the President (R 160).

In the same vein, President Johnson, in a message to Congress stated:

> "We do seek packages that are easily understood and compared with respect to sizes, weights and degrees of fill . . . Package[r]s themselves should take the initiative in this effort. It is in the best interests of the manufacturer and retailer as well as the consumer." (R 158-159)

POINT III

New York State's regulation is a permissible exercise of its police power and places no undue burden upon interstate commerce.

A.

Appellants' contention that the New York regulation violates the commerce clause is clearly without merit. The commerce clause grants to the Congress power to regulate commerce between the states but the states have not been excluded from regulating matters of local concern although such matters may, in some measure, affect interstate commerce. *Minnesota Rate Cases,* 230 U. S. 352, 379-380; *Reid*

v. *Colorado,* 187 U. S. 137. This proposition is limited only in cases where "the state legislation . . . unduly burdens that commerce in matters where unformity is necessary . . ." *Morgan* v. *Commonwealth of Virginia,* 328 U. S. 373, 377. The classic illustration of a permissible subject for state regulation is in the field of police power legislation. *Head* v. *New Mexico Board,* 374 U. S. 424, 429. Thus in *Huron Portland Cement Co.* v. *City of Detroit,* 362 U. S. 440, this Court pertinently observed:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the Country . . .' *Sherlock* v. *Alling,* 93 U. S. 99, 103." *Id.* at 443-444.

In particular, the states may legislate with respect to "the protection of the people against fraud and deception in the sale of food products" despite the fact that "such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State." *Plumley* v. *Massachusetts,* 155 U. S. 461, 472. See also *Savage* v. *Jones,* 225 U. S. 501, 525; *Patapaco Guano Co.* v. *North Carolina,* 171 U. S. 355.

Appellants clearly recognize the right of states to protect its residents from fraud and deception through passage of inspection laws. Thus they concede that neither the federal constitution nor the federal enactment "divests the state of all its authority over net weights" (App. Br. pp. 30-31). Appellants further concede that the state "retains its authority to protect the pubic against false weights or measures" (App. Br. p. 31). Accordingly, they properly recognize that New York's "net weight" regulation lies within the valid police power of the state to protect its consumers against false weights.

Since the only constitutional limitations upon the validity of state police power legislation are that such legislation must not "discriminate against interstate commerce or operate to disrupt its required uniformity . . ." *Huron Portland Cement Co.* v. *City of Detroit, supra* at 448, appellants' contention must fail since appellee's interpretation of the term "net weight" cannot by any stretch of the imagination fall within the prohibition of the *Huron* case.

Appellants' contention that New York's regulation discriminates against interstate commerce is untenable. Their position that only intrastate processors can comply with appellee's interpretation of the weight regulation is not borne out by the record and is contrary to the decision of the District Court. Appellants wholly failed to show that New York State's regulation preferred, in any respect, New York processors of stuffed turkeys over appellants. Nor is there any proof by appellants that they cannot comply with appellee's labelling requirement, which would be satisfied by a federal supplementary label or tag as found by the District Court. There is no actual burden on the appellants resulting from New York's requirement of this supplementary label or tag simply because they may have to modify their production practices.

Their assertion that the labelling provisions in the federal regulation so occupy the field so as to preclude a state enactment on that subject repeated in this connection has been discussed under the preceding point (Br. *supra*, Point II).

Furthermore, as we have pointed out, by the explicit terms of the federal enactment there is undeniably no requirement of "uniformity of [national] regulation" (*Head* v. *New Mexico Board*, 374 U. S. 424, 429) for labeling in the instant federal statute. As the District Court found, the New York regulation is a proper exercise of its police power and places no burden on commerce in contravention of the commerce clause. *Savage* v. *Jones,* 225 U. S. 501, 525. See also *Armour & Co.* v. *North Dakota,* 240 U. S. 510. There is no basis for challenging the finding and conclusion of the District Court.

The argument of appellants that other states *might* in the future pass different legislation cannot be maintained in the absence of any evidence of actual present conflict which can be appraised. Indeed, the possibility of contrary requirements of other states is remote. *Huron Portland Cement Co.* v. *City of Detroit, supra,* at page 448; *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U. S. 520, 529; *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28, 37.

B.

Appellants' contention that the New York regulation unduly burdens interstate commerce becomes even more tenuous when we consider that they are seeking to enjoin the appellee from interpreting the state regulation affecting the *retail* sale of stuffed turkeys. This Court has consistently held that the commerce clause does not extend to merchandise originating in interstate commerce after it comes to rest within the borders of the State. *E.g., Schecter Poultry* v. *United States,* 295 U. S. 495; *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167.

In *Armour & Co.* v. *North Dakota,* 240 U. S. 510, this Court upheld the validity of a state statute, regulating the containers of lard sold within the state, which was attacked as being violative of the commerce clause. There the Court stated:

> "It is objected that the law violates the commerce clause of the Constitution. This is certainly not true of the sale to Ladd. It was distinctly by retail and in the package of retail, not in the package of importa-

> tion *and* it is to such retail sales the statute is directed. It does not attempt to regulate the transportation to the State.
>
> Nor do we think the law is repugnant to the Pure Food & Drug Act of June 30, 1906 . . . That Act is directed against the adulteration and misbranding of articles of food transported in interstate commerce. The state statute has no such purpose; it is directed to the manner of selling at retail, which is in no way repugnant to the Federal Law . . . , and the operating of that law is in no way displaced or interfered with." *id.* at 517.

The holding of this Court in *Armour & Co.* v. *North Dakota, supra,* cogently answers the contentions of the appellants in this proceeding. In the case at bar the state statute similarly regulated retail sales and was clearly not designed to regulate the interstate aspect of the goods in transport. Moreover, the federal act in question here is directed against the transportation of unwholesome poultry through the stream of commerce. The state enactment, however, seeks only to protect its citizens from false and misleading weight statements on the poultry container. The means by which this protection is accorded the consumer is through regulation of retailers—when the poultry product is finally at rest within the State. This Court pertinently observed in *Schecter Poultry* v. *United States,* 295 U. S. 495:

> ". . . So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State . . . Hence, decisions which deal with a stream of interstate commerce . . . —and with regulations of transactions involved in that practiced continuity of movement, are not applicable here . . ." *id.* at 543.

Accordingly, since the state regulation here attaches to goods at rest within its borders and does not seek to regulate interstate transportation of goods, appellants' contention of undue burden on commerce by appellee is patently untenable.

POINT IV

New York State's regulation as construed by appellee is neither arbitrary nor discriminatory, is applied equally to all processors and does not deny appellants the due process and equal protection provisions of the Fourteenth Amendment.

Appellants have attempted to spell out violations of the due process and equal protection clauses of the Fourteenth Amendment by arguing that the application of New York State law to out-of-state processors of frozen stuffed turkeys is discriminatory and arbitrary and that the classification made by New York, in the exercise of its police power, is not based on "some real and substantial difference which bears a reasonable and just relation to the object of the legislation * * *". The Court below disposed of this claim by appellants by stating "the claims under the Fourteenth Amendment are so patently baseless that we mention them only to show they were not overlooked" (R. 380).

It is fundamental that legislative enactments are presumed to be constitutional and, likewise, to be supported by facts known to the Legislature. *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 69; *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 210; *East New York Savings Bank* v. *Hahn,* 326 U. S. 230; *United States* v. *Carolene Products Co.,* 304 U. S. 144; *Matter of Ahern* v. *South Buffalo Ry. Co.,* 344 U. S. 367. As those cases hold, while the presumption of legislative validity is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt. The party having the burden of proving the invalidity of a statute must do so clearly and must over-come by facts judicially known or proved, not only the presumption of constitutionality, but also any state of facts which can be reasonably conceived to sustain it.

The mere fact that the enactment of a statute results in reduced income, inflicts other pecuniary injury or even makes it impossible for some people to continue in business does not establish a denial of due process or equal protection. See *Staten Island Loaders, Inc.* v. *Waterfront Comm. of New York Harbor,* 117 F. Supp. 308 (S.D.N.Y.), *aff'd* 347 U. S. 439, *rearg. den.* 347 U. S. 994; *Ferguson* v. *Skrupa,* 372 U. S. 726; *Nebbia* v. *State of New York,* 291 U. S. 502; *Kovaks* v. *Cooper,* 336 U. S. 77. Thus, it is a well-settled maxim of constitutional law that a Legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts and with the purpose of promoting the public interest. Nothing to impair the application of this maxim appears in this case. *United States* v. *Carolene Products Co., supra* at 154.

The claim of discrimination is entirely unfounded. There is absolutely no evidence that New York State is treating out-of-state processors differently than domestic processors. The law is applied to all on the same basis and there is no difference in compliance. Moreover, state statutes may create classifications or separate groupings and this in and of itself does not violate the Fourteenth Amendment. It is only "invidious discrimination" which offends the constitution and that point has not been reached in this case. *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61. The grouping or classification of processors of poultry can hardly be challenged as discriminatory. *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Assn., Inc.,* 360 U. S. 334; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 151; *Goessert* v. *Cleary,* 335 U. S. 464; see also *Bowles* v. *Willingham,* 32 U. S. 503.

Appellants argue that the statute and regulations as applied by the appellee are not reasonable means for achieving the legislative aim, namely, protection of its consumers. Yet, it is difficult to envision a more appropriate method to accomplish the legislative purpose and afford the consumer the protection he is entitled to receive. There can be no question but that the legitimate aim of the State legislation is accomplished by appellants' action. See *DeVau* v. *Braisted,* 363 U. S. 144.

States have power to legislate against what any one state finds to be injurious practices in its internal affairs. *Lincoln Federal Union of A. F. of L.* v. *Northwestern Iron and Metal Co.,* 335 U. S. 525, 536. In determining that meat, meat food products and poultry when offered for sale must show the weight of the product and the net weight of the combined product, New York is obviously attempting to protect its consumers from false and misleading weights. The fact that certain other products, such as "t.v. dinners", are not placed in the same classification is of no consequence since it has been consistently held that the fact that the Legislature does not occupy the entire area raises no Fourteenth Amendment question. *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *Gold* v. *DiCarlo,* 235 F. Supp. 817 (S.D.N.Y.), *aff'd* —— U. S. ——, 14 L. Ed. 2d 266; *Goessert* v. *Cleary,* 74 F. Supp. 735, 739, *aff'd* 335 U. S. 464.

Appellants seek to show that the inspection procedures of New York under the statute (App. br. p. 37) are inadequate in the case of stuffed turkeys by referring to the testimony of the Director of Weights and Measures of the New York Department of Agriculture and Markets that it is "impossible" to check the weight of ingredients of such combination foods as "T.V. dinners, ravioli, hash, pork and beans". The New York statute in question does not apply to such combination foods. In fact, New York regulation § 221.9(c) (App. Appendix p. 33a) specifically excludes such combination foods and classifies them as a "ready to eat meal sold as a unit for consumption elsewhere than on the premises sold." These items are generally sold as a unit so that the consumer pays a fixed price for each unit and all of the units are sold at the same price. In the case of stuffed turkeys which vary in weight and are sold by the pound the requirement of separate weights applies.

Furthermore, this Court has stated that the Courts will not apply the due process or equal protection clauses of the constitution to challenge state laws, because such laws may be deemed unwise, improvident, or out of harmony with a practical school of thought. *Ferguson* v. *Skrupa,* 372 U. S. 726 (1963). Whether based on due process or equal protection contentions, it is beyond plausible dispute that this constitutional challenge is wholely devoid of any colorable merit.

CONCLUSION

Since the three-judge District Court was improperly convened direct appeal to this Court was not authorized. In any event the judgment of the District Court dismissing the complaint should be affirmed.

Dated: New York, New York, September 23, 1965.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 9.—October Term, 1965.

Swift & Company, Inc., et al., Appellants,
v.
Don J. Wickham, Commissioner of Agriculture and Markets of New York.

On Appeal From the United States District Court for the Southern District of New York.

[November 22, 1965.]

Mr. Justice Harlan delivered the opinion of the Court.

Appellants, the Swift and Armour Companies, stuff, freeze, and package turkeys which they ship to retailers throughout the country for ultimate sale to consumers. Each package is labeled with the net weight of the particular bird (including stuffing) in conformity with a governing federal statute, the Poultry Products Inspection Act of 1957, 71 Stat. 441, 21 U. S. C. §§ 451–469 (1964 ed.), and the regulations issued under its authority by the Secretary of Agriculture.[1] Many of these turkeys are sold in New York. Section 193 of New York's Agriculture and Markets Law[2] has been interpreted through regulations and rulings to require that these packaged turkeys be sold with labels informing the public of the weight of the unstuffed bird as well as of the entire package. Because the amount of stuffing varies with each bird, the State thus seeks to help purchasers ascertain just how much fowl is included in each ready-for-the-oven turkey.

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[1] Section 457 (b) declares:

"The use of any written, printed or graphic matter upon or accompanying any poultry product inspected or required to be inspected pursuant to the provisions of this chapter or the container thereof which is false or misleading in any particular is prohibited."

Section 458 (d) prohibits "Using in commerce, or in a designated major consuming area, a false or misleading label on any poultry product."

The Secretary of Agriculture is authorized by § 463 to issue regulations. 7 CFR § 81.125 requires containers to bear "approved labels"; § 81.130 (a)(3) declares that labels must include the net weight of the contents and that "The net weight marked on containers of poultry products shall be the net weight of the poultry products and shall not include the weights of the wet or dry packaging materials and giblet wrapping materials."

Swift and Armour requested permission of the Poultry Products Section of the Department of Agriculture to change their labels in order to conform with New York's requirements, but such permission was refused at the initial administrative level and no administrative review of that refusal was sought. Swift and Armour then brought this federal action to enjoin the Commissioner of Agriculture and Markets of New York from enforcing the State's labeling provisions, asserting that enforcement would violate the Commerce Clause and the Fourteenth Amendment of the Federal Constitution and overriding requirements of the federal poultry enactment.

Pursuant to appellants' request, a three-judge district court was constituted under 28 U. S. C. § 2281 (1964 ed.), which provides for such a tribunal whenever the enforcement of a state statute is sought to be enjoined "upon the ground of the unconstitutionality of such statute." The District Court, unsure of its jurisdiction for reasons appearing below, dismissed the suit on the merits[3] acting both in a three-judge and single-judge capacity.[4] Appeals were lodged in the Court of Appeals for the Second Circuit from the single-judge determination, and in this Court from the three-judge decision in accordance with the direct appeal statute, 28 U. S. C. § 1253 (1964 ed.). The threshold question before us, the consideration of which we postponed to the merits (379 U. S. 997), is whether this Court, rather than the Court of Appeals, has jurisdiction to review the District Court determination, and this in turn depends on whether a three-judge court was required. We hold that it was not.

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[2] Section 193-3 provides:

"All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the commissioner."

Net weight was not defined in the regulation, 1 NYCRR § 221.40 (now § 221.9 (c)), but "[t]he Director of the Bureau of Weights and Measures of the Department testified that he interpreted the regulation, as applied to stuffed turkeys, to require statement of the net weight both of the unstuffed and of the stuffed bird, and that, when asked, he so advised local sealers of weights and measures." *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 401 (1964).

At the outset, we agree with the District Court that the Commerce Clause and Fourteenth Amendment claims alleged in the complaint are too insubstantial to support the jurisdiction of a three-judge court. It has long been held that no such court is called for when the alleged constitutional claim is insubstantial, *Ex parte Poresky*, 290 U. S. 30; *California Water Service Co.* v. *City of Redding*, 304 U. S. 252. Since the only remaining basis put forth for enjoining enforcement of the state enactment was its asserted repugnancy to the federal statute, the District Court was quite right in concluding that the question of a three-judge court turned on the proper application of our 1962 decision in *Kesler* v. *Department of Public Safety,* 369 U. S. 153. There we decided that in suits to restrain the enforcement of a state statute allegedly in conflict with or in a field pre-empted by a federal statute, § 2281 comes into play only when the Supremacy Clause of the Federal Constitution is immediately drawn in question, but not when issues of federal or state statutory construction must first be decided even though the Supremacy Clause may ultimately be implicated. Finding itself unable to say with assurance whether its resolution of the merits of this case involved *less* statutory construction than had taken place in *Kesler,* the District Court was left with the puzzling question how much *more* statutory construction than occurred in *Kesler* is necessary to deprive three judges of their jurisdiction.

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[3] The court below rejected appellants' Commerce Clause and Fourteenth Amendment arguments, held that there had been no federal pre-emption of this field of regulation, and though implying strongly that the New York labeling requirements did not conflict with federal requirements, held that this question should first be passed upon at a higher federal administrative level.

[4] The three-judge court dismissed the complaint "certifying out of abundant caution" that the original district judge, also a member of the three-judge panel, "individually arrived at the same conclusion." 230 F. Supp., at 410. This procedure for minimizing prejudice to litigants when the jurisdiction of a three-judge court is unclear has been used before, see *Query* v. *United States*, 316 U. S. 486.

It might suffice to dispose of the three-judge court issue for us to hold, in agreement with what the District Court indicated, 230 F. Supp., at 410, that this case involves so much more statutory construction than did *Kesler* that a three-judge court was inappropriate. (We would indeed find it difficult to say that *less* or no more statutory construction was involved here than in *Kesler* and that therefore under that decision a three-judge court was necessary.) We think, however, that such a disposition of this important jurisdictional question would be less than satisfactory, that candor compels us to say that we find the application of the *Kesler* rule as elusive as did the District Court, and that we would fall short in our responsibilities if we did not accept this opportunity to take a fresh look at the problem. We believe that considerations of *stare decisis* should not deter us from this course. Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great. For reasons given in this opinion, we have concluded that the *Kesler* doctrine in this area of § 2281 is unsatisfactory, and that *Kesler* should be *pro tanto* overruled. The overruling of a six-to-two decision[5] of such recent vintage, which was concurred in by two members of the majority in the present case,[6] and the opinion in support of which was written by an acknowledged expert in the field of federal jurisdiction, demands full explication of our reasons.

I.

The three-judge district court is a unique feature of our jurisprudence, created to alleviate a specific discontent within the federal system. The antecedent of § 2281 was a 1910 Act[7] passed to assuage growing popular displeasure with the frequent grants of injunctions by federal courts against the operation of state legislation regulating railroads and utilities in particular.[8] The federal courts of the early nineteenth century had occasionally issued injunctions at the behest of private litigants against state officials to prevent the enforcement of state statutes,[9] but such cases were rare and generally of a character that did not offend important state policies. The advent of the Granger and labor movements in the late nineteenth century,[10] and the acceleration of state social legislation especially through the creation of regulatory bodies met with opposition in the federal judiciary. In *Chicago, M. & St. P. R. Co.* v. *Minnesota,* 134 U. S. 418, this Court held that the setting of rates not permitting a fair return violated the Due Process Clause of the Fourteenth Amendment. *Ex parte Young,* 209 U. S. 123, established firmly the corollary that inferior federal courts could enjoin state officials from enforcing such unconstitutional state laws.

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[5] Mr. Justice Whittaker took no part in the decision of the case.

[6] MR. JUSTICE BRENNAN and the present writer were included in the *Kesler* majority.

[7] Act of June 18, 1910, c. 309, § 17, 36 Stat. 557.

[8] See Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 3-9 (1964); Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795 (1934); Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345 (1930). For more contemporary accounts see, *e. g.*, Baldwin, Presidential Address: The Progressive Unfolding of the Powers of the United States, 6 Am. Pol. Sci. Rev. 1, 8-9 (1912); Scott, The Increased Control of State Activities By the Federal Courts, 3 Am. Pol. Sci. Rev. 347 (1909). Although various types of state legislation were being challenged in injunctive suits, see Lockwood, Maw, & Rosenberry, The Use of the Federal Injunction in Constitutional Litigation, 43 Harv. L. Rev. 426 (1930), most numerous and prominent were the

This confrontation between the uncertain contours of the Due Process Clause and developing state regulatory legislation, arising in district courts that were generally considered unsympathetic to the policies of the States, had severe repercussions. Efforts were made in Congress to limit in various ways the jurisdiction of federal courts in these sensitive areas.[11] State officials spoke out against the obstruction and delay occasioned by these

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railroad cases. Senator Overman noted that ". . . nine out of ten of the cases where application for an injunction has been made to test the constitutionality of state statutes have been railroad cases." 45 Cong. Rec. 7254 (1910).

[9] *E. g., Spooner* v. *McConnell,* 22 Fed. Cas. 939 (No. 13245) (1838).

[10] See S. J. Buck, The Granger Movement, esp. 194–214, 231–237 (1913); Jackson, The Struggle For Judicial Supremacy 48–68 (1949); 2 Warren, The Supreme Court in United States History 574–599 (1935). For the related story of the use of the equity power in the labor field, see Frankfurter and Greene, The Labor Injunction (1930).

[11] See Hutcheson, *supra,* at 803–804.

federal injunction suits.[12] The sponsor of the bill establishing the three-judge procedure for these cases, Senator Overman of North Carolina, noted:

> "[T]here are 150 cases of this kind now where one federal judge has tied the hands of the state officers, the governor, and the attorney-general . . . .
>
> . . . . .
>
> Whenever one judge stands up in a State and enjoins the governor and the attorney-general, the people resent it, and public sentiment is stirred, as it was in my State, when there was almost a rebellion, whereas if three judges declare that a state statute is unconstitutional the people would rest easy under it." 45 Cong. Rec. 7256.[13]

In such an atmosphere was this three-judge court procedure put on the statute books, and although subsequent Congresses have amended the statute [14] its basic structure remains intact.

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[12] See, *e. g.*, 45 Cong. Rec. 7253 (1910) (remarks of Senator Crawford). Although some litigation of this sort dragged on for as much as five years, *ibid.*, it is not clear that most state courts were any more expeditious, see Lilienthal, The Federal Courts and State Regulation of Public Utilities, 43 Harv. L. Rev. 379, 417 and n. 176 (1930).

[13] Senator Overman was probably referring to *Southern R. Co.* v. *McNeill*, 155 F. 756 (1907). There, after an injunction had been sustained by the Circuit Court, the Governor publicly urged state officials to ignore it. The railway complained to the Court that "these attacks on the part of the Governor and state officials against the company and its agents . . . had the effect of demoralizing the servants, agents, and employés of the company to such an extent as to render it well nigh impossible for complainant to properly discharge the duties which it owed the public . . . ." *Id.*, at 790–791.

[14] The procedure was extended to cover challenges to orders of state administrative commissions in 1913, 37 Stat. 1013, 28 U. S. C. § 2281, and in 1925 suits for permanent injunctions were brought within its purview, 43 Stat. 938, 28 U. S. C. § 2281. Three-judge

II.

Section 2281 was designed to provide a more responsible forum for the litigation of suits which, if successful, would render void state statutes embodying important state policies. The statute provides for notification to the State of a pending suit, 28 U. S. C. § 2284 (2) (1964 ed.), thus preventing *ex parte* injunctions common previously.[15] It provides for three judges, one of whom must be a circuit judge, 28 U. S. C. § 2284 (1) (1964 ed.), to allow a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas. It authorizes direct review by this Court, 28 U. S. C. § 1253, as a means of accelerating a final determination on the merits; an important criticism of the pre-1910 procedure was directed at the length of time required to appeal through the circuit courts to the Supreme Court, and the consequent disruption of state tax and regulatory programs caused by the outstanding injunction.[16]

That this procedure must be used in any suit for an injunction against state officials on the ground that a state enactment is unconstitutional has been clear from the start. What yet remains unclear, in spite of de-

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district courts are also required in certain suits arising under federal law. See Note, The Three-Judge District Court: Scope and Procedure Under Section 2281, 77 Harv. L. Rev. 299, 300–301 and n. 19 (1963).

[15] See Hutcheson, *supra*, at 800–801. Senator Crawford of South Dakota told the Congress that when his State Legislature was debating a maximum rate law, the railway companies had already prepared motions for injunctions:

"The statute passed and was presented to the governor for his signature, and in less than an hour after he had signed the bill and it was filed in the office of the secretary of state a restraining order came by telegraph from a United States judge, enjoining the governor and the attorney-general and all the officers in the State from proceeding to enforce that statute." 45 Cong. Rec. 7252 (1910).

[16] See, *id.*, at 7256 (remarks of Senator Crawford); note 12, *ante*.

cisions by this and other courts, is the scope of the phrase "upon the ground of the unconstitutionality of such statute" when the complaint alleges not the traditional Due Process Clause, Equal Protection Clause, Commerce Clause, or Contract Clause arguments, but rather that the state statute or regulation in question is pre-empted by or in conflict with some federal statute or regulation thereunder. Any such pre-emption or conflict claim is of course grounded in the Supremacy Clause of the Constitution: if a state measure conflicts with a federal requirement, the state provision must give way. *Gibbons* v. *Ogden*, 9 Wheat. 1. The basic question involved in these cases, however, is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes. Whether one district judge or three must carry out this function is the question at hand.

The first decision of this Court casting light on the problem was *Ex parte Buder*, 271 U. S. 461, in which the question presented was, as here, whether an appeal was properly taken directly from the District Court to the Supreme Court. At issue was whether a Missouri statute authorizing taxation of bank shares remained valid after the enactment of a federal statute which enlarged the scope of the States' power to tax national banks by permitting taxation of shares, or dividends, or income. Under the federal scheme, States were apparently expected to choose one of the three methods. Although the Missouri law applied the first basis of assessment, the District Court held that because the State did not explicitly choose among the three types of taxation, but instead relied on a prior statute, the assessment was void. Mr. Justice Brandeis, writing for a unanimous Court, held that this was not properly a three-judge court case ". . . because no state statute was assailed as being repugnant to the Federal Constitution." 271

U. S., at 465. Although the complaint is *Buder* did not explicitly invoke the Supremacy Clause, it should be noted that the defendants' answer asserted that if the federal statute was constitutional under the Tenth Amendment, then it would indeed be the " 'supreme law of the land' within the meaning and provisions of Article VI of the Constitution of the United States," and thus controlling over the particular state statute unless that statute could be construed as consistent with the federal law. The District Court in *Buder* was thus clearly presented with the Supremacy Clause basis of the statutory conflict.

Ex parte Bransford, 310 U. S. 354, raised a similar problem, also in the context of the validity of a state tax. The Court again held this type of federal-state confrontation outside the purview of the predecessor of § 2281:

> "If such assessments are invalid, it is because they levy taxes upon property withdrawn from taxation by federal law or in a manner forbidden by the National Banking Act. The declaration of the supremacy clause gives superiority to valid federal acts over conflicting state statutes but this superiority for present purposes involves merely the construction of an act of Congress, not the constitutionality of the state enactment." 310 U. S., at 358–359.

In a third case, *Case* v. *Bowles,* 327 U. S. 92, the question involved the proposed sale by the State of Washington of timber on state-owned land at a price violating the Federal Emergency Price Control Act. A federal district court enjoined the sale, and on appeal the State argued that the single judge lacked jurisdiction. This Court held otherwise: "the complaint did not challenge the constitutionality of the state statute but alleged merely that its enforcement would violate the

Emergency Price Control Act. Consequently a three-judge court is not required." 327 U. S., at 97.[17]

The upshot of these decisions seems abundantly clear: Supremacy Clause cases are not within the purview of § 2281.[18] This distinction between cases involving claims that state statutes are unconstitutional within the scope of § 2281 and cases involving statutory pre-emption or conflict remained firm until *Kesler* v. *Department of Public Safety,* 369 U. S. 153, in which the plaintiff alleged a conflict between the federal bankruptcy laws and a state statute suspending the driving licenses of persons who are judgment debtors as a result of an adverse decision in an action involving the negligent operation of an automobile. It was argued that federal policy underlying the bankruptcy law overrode the State's otherwise legitimate exercise of its police power. Mr. Justice Frankfurter, for a majority, declared first that § 2281 made no distinction between the Supremacy Clause and other provisions of the Constitution as a ground for denying enforcement to a state statute, and second that *Buder, Bransford,* and *Case* could be distinguished on the ground that they presented no claims of unconstitutionality as such: "If in immediate controversy is not the unconstitutionality of a state law but merely the construction of a state law or the federal law, the three-judge requirement does not become operative." 369 U. S., at 157. In the *Kesler* case itself, Mr. Justice Frankfurter said, there was no problem of statutory construction but only a "constitutional question" whether the state enactment was pre-empted. After what can only be characterized as extensive statutory analysis (369 U. S., at 158–174) the majority concluded that there had in fact been no pre-emption.[19]

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[17] This basic rule has been reiterated in other familiar cases where the facts did not require its application. See *Query* v. *United States,* 316 U. S. 486, where, however, a three-judge court was found necessary because other not insubstantial constitutional claims had been clearly asserted. In *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U. S. 73, the majority held that if a state statute is sought to be enjoined on constitutional grounds (Commerce Clause, Equal Protection) it did not matter that a "nonconstitutional" ground (pre-emption by the Federal Agricultural Marketing Agreement Act) was also asserted. Mr. Justice Frankfurter dissented, reasoning that the three-judge procedure should be read narrowly and that the mere availability of a "non-constitutional" basis for enjoining the state statute should give jurisdiction to a single judge. Both majority and dissent assumed that an attack upon a state enactment on the ground that it was inconsistent with a federal statute was such a "non-constitutional" ground.

[18] None of these cases can be read to suggest that the result depends on whether or not the complaint specifically invokes the Supremacy Clause, for that clause is the inevitable underpinning for the striking down of a state enactment which is inconsistent with federal law. See the quotation from *Bransford, ante,* p. —, a case in which the Supremacy Clause was not invoked in the complaint. See also the discussion of *Ex parte Buder, ante,* p. —. Nor do any of these cases suggest that the issue turns on the amount of statutory construction involved, whether large, small, or simply of the character that entails laying the alleged conflicting statutes side by side.

III.

In re-examining the *Kesler* rule the admonition that § 2281 is to be viewed "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such," *Phillips* v. *United States,* 312 U. S. 246, 251, should be kept in mind. The *Kesler* opinion itself reflects this admonition, for its rationalization of *Buder, Bransford,* and *Case* as being consistent with the view that Supremacy Clause cases are not excluded from "the comprehensive language of § 2281," 369 U. S., at 156, is otherwise most difficult to explain.

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[19] In dissent it was stated that the *Kesler* opinion "refutes the very test which it establishes." 369 U. S., at 177 (dissenting opinion of THE CHIEF JUSTICE). In addition, three Justices dissented in whole or in part from the conclusions derived from this statutory analysis.

As a procedural rule governing the distribution of judicial responsibility the test for applying § 2281 must be clearly formulated. The purpose of the three-judge scheme was in major part to expedite important litigation: it should not be interpreted in such a way that litigation, like the present one, is delayed while the proper composition of the tribunal is litigated. We are now convinced that the *Kesler* rule, distinguishing between cases in which substantial statutory construction is required and those in which the constitutional issue is "immediately" apparent, is in practice unworkable. Not only has it been uniformly criticized by commentators,[20] but lower courts have quite evidently sought to avoid dealing with its application [21] or have interpreted it with uncertainty.[22] As Judge Friendly's opinion for the court below demonstrates, in order to ascertain the correct forum, the merits must first be adjudicated in order to discover whether the court has "engaged in so much more construction than in Kesler as to make that ruling inapplicable." 230 F. Supp., at 410. Such a formulation, whatever its abstract justification, cannot stand as an every-day test for allocating litigation between district courts of one and three judges.

Two possible interpretations of § 2281 would provide a more practicable rule for three-judge court jurisdiction. The first is that *Kesler* might be extended to hold, as some of its language might be thought to indicate,[23] that *all* suits to enjoin the enforcement of a state statute, whatever the federal ground, must be channeled through three-judge courts. The second is that *no* such suits resting solely on "supremacy" grounds fall within the statute.

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[20] See Currie, *supra*, at 61–64 (1964); Note, 77 Harv. L. Rev. 299 313–315 (1963); Note, 49 Va. L. Rev. 538, 553–555 (1963); 76 Harv. L. Rev. 168 (1962); 15 Stan. L. Rev. 565 (1963); 1962 U. Ill. L. Forum 467; 111 U. Pa. L. Rev. 113 (1962).

[21] See *Borden Co.* v. *Liddy*, 309 F. 2d 871; *American Travelers Club, Inc.* v. *Hostetter*, 219 F. Supp. 95, 102, n. 7.

[22] See, in addition to the case before us, *Bartlett & Co.* v. *State Corp. Commission of Kansas*, 223 F. Supp. 975.

The first alternative holds some attraction. First, it is relatively straightforward: a court need not distinguish among different constitutional grounds for the requested injunction; it need look only at the relief sought. Moreover, in those cases, as in that before us, in which an injunction is sought on several grounds, the proper forum would not depend on whether certain alleged constitutional grounds turn out to be insubstantial. Second, § 2281 speaks of "unconstitutionality," and, to be sure, any determination that a state statute is void for obstructing a federal statute does rest on the Supremacy Clause of the Federal Constitution. And, third, there is some policy justification for a wider rule. In a broad sense, what concerned the legislators who passed the progenitor of § 2281 was the voiding of state legislation by inferior federal courts. The sensibilities of the citizens, and perhaps more particularly of the state officials, were less likely to be offended, the Congress thought, by a judgment considered and handed down by three judges rather than by one judge. This rationale can be thought to be as applicable to a suit voiding state legislation on grounds of conflict with a federal statute as it is to an identical suit alleging a conflict with the Federal Constitution directly.

Persuasive as these considerations may be, we believe that the reasons supporting the second interpretation, that is returning to the traditional *Buder-Bransford-Case* rule, should carry the day. This restrictive view of the application of § 2281 is more consistent with a discriminating reading of the statute itself than is the first and more embracing interpretation. The statute requires a three-judge court in order to restrain the enforcement of a state statute "upon the ground of the unconstitutionality of such statute." Since all federal actions to enjoin a state enactment rest ultimately on the Supremacy Clause,[24] the words "upon the ground of the unconstitutionality of such statute" would appear to be superfluous unless they are read to exclude some types of such injunctive suits.[25] For a simple provision prohibiting the restraint of the enforcement of any state statute except by a three-judge court would manifestly have sufficed to embrace every such suit whatever its particular constitutional ground. It is thus quite permissible to read the phrase in question as one of limitation, signifying a congressional purpose to confine the three-judge court requirement to injunction suits depending directly upon a substantive provision of the Constitution, leaving cases of conflict with a federal statute (or treaty) to follow their normal course in a single-judge court. We do not suggest that this reading of § 2281 is compelled. We do say, however, that it is an entirely appropriate reading, and one that is supported by all the precedents in this Court until *Kesler* and by sound policy considerations.

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[23] "Neither the language of § 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of § 2281." 369 U. S., at 156.

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[24] Art. VI, cl. 2. "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

[25] The "unconstitutionality" clause of § 2281 can hardly be thought to encompass the voiding of a state statute for inconsistency with the state constitution. Cf. *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 80.

An examination of the origins of the three-judge procedure does not suggest what the legislators would have thought about this particular problem, but it does show quite clearly what sort of cases *were* of concern to them. Their ire was aroused by the frequent grants of injunctions against the enforcement of progressive state regulatory legislation, usually on substantive due process grounds. (See pp. —, —, *ante.*) Requiring the collective judgment of three judges and accelerating appeals to this Court were designed to safeguard important state interests. In contrast, a case involving an alleged incompatibility between state and federal statutes, such as the litigation before us, involves more confining legal analysis and can hardly be thought to raise the worrisome possibilities that economic or political predilections will find their way into a judgment. Moreover, those who enacted the three-judge court statute should not be deemed to have been insensitive to the circumstance that single-judge decisions in conflict and pre-emption cases were always subject to the corrective power of Congress, whereas a "constitutional" decision by such a judge would be beyond that ready means of correction and could be dealt with only by constitutional amendment. The purpose of § 2281 to provide greater restraint and dignity at the district court level cannot well be thought generally applicable to cases that involve conflicts between state and federal statutes, in this instance determining whether the Department of Agriculture's regulations concerning the labeling of total net weight on frozen stuffed turkeys necessarily renders invalid a New York statute requiring a supplemental net weight figure which excludes the stuffing.

Our decision that three-judge courts are not required in Supremacy Clause cases involving only federal-state statutory conflicts, in addition to being most consistent with the statute's structure, with pre-*Kesler* precedent, and with the section's historical purpose, is buttressed by important considerations of judicial administration. As Mr. Justice Frankfurter observed in *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 92–93 (dissenting opinion):

> "[T]he convening of a three-judge trial court makes for dislocation of the normal structure and functioning of the lower federal courts, particularly in the vast non-metropolitan regions; and direct review of District Court judgments by this Court not only expands this Court's obligatory jurisdiction but contradicts the dominant principle of having this Court review decisions only after they have gone through two judicial sieves . . . ."

Although the number of three-judge determinations each year should not be exaggerated,[18] this Court's concern for efficient operation of the lower federal courts persuades us to return to the *Buder-Bransford-Case* rule, thereby conforming with the constrictive view of the three-judge jurisdiction which this Court has traditionally taken. *Ex parte Collins*, 277 U. S. 565; *Oklahoma Gas & Elec. Co.* v. *Oklahoma Packing Co.*, 292 U. S. 386; *Rorick* v. *Board of Commissioners*, 307 U. S. 208; *Phillips* v. *United States*, 312 U. S. 246.

We hold therefore that this appeal is not properly before us under 28 U. S. C. § 1253 and that appellate review lies in the Court of Appeals, where appellants' alternative appeal is now pending. The appeal is dismissed for lack of jurisdiction.

It is so ordered.

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[18] The statistics are summarized in Note, 77 Harv. L. Rev. 299, 303–305 (1963); Note, 72 Yale L. J. 1646, 1654–1659 (1963). The most recent figures show that out of the 11,485 trials completed in district courts in fiscal 1965, only 147 were heard by three-judge courts. Of these 60 dealt with I. C. C. regulations, 35 with civil rights, and only 52 with state or local law. 1965 Dir. Adm. Off. U. S. Courts Ann. Rep. II–25 to II–28.

important considerations of judicial administration. As Mr. Justice Frankfurter observed in Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U. S. 73, 92-93 (dissenting opinion):

"The convening of a three-judge court makes for dislocation of the normal structure and functioning of the lower federal courts, particularly in the vast non-metropolitan districts, and direct review of District Court judgments by this Court not only expands this Court's obligatory jurisdiction but contradicts the dominant principle of having this Court review decisions only after they have gone through two judicial sieves. . . ."

Although the number of three-judge determinations each year should not be exaggerated,[11] this Court's concern for efficient operation of the lower federal courts persuades us to adhere to the Bryant-Ex parte Collins line, thereby harmonizing with the restrictive view of the three-judge procedure which the Court has traditionally taken. Ex parte Collins, 277 U. S. 565; Oklahoma Gas & Electric Co. v. Oklahoma Packing Co., 292 U. S. 386, 391; Rorick v. Board of Commissioners, 307 U. S. 208, 212; Phillips v. United States, 312 U. S. 246.

We hold, therefore, that this appeal is not properly before us under 28 U. S. C. § 1253 and that appellate review lies in the Court of Appeals, where appellants' alternative appeal is now pending. The appeal is dismissed for lack of jurisdiction.

It is so ordered.

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[11] The statistics are summarized in Currie, 32 U. Chi. L. Rev. 1, 74-76 (1964). The most recent figures show that out of the 11,481 trials completed in district courts in fiscal 1965, only 147 were heard by three-judge courts. Of these 49 dealt with I. C. C. regulations, 45 with the constitutionality of a state or local law. [illegible]

SUPREME COURT OF THE UNITED STATES

No. 9.—October Term, 1965.

Swift & Company, Inc., et al., Appellants, *v.* Don J. Wickham, Commissioner of Agriculture and Markets of New York.	On Appeal From the United States District Court for the Southern District of New York.

[November 22, 1965.]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Clark concur, dissenting.

Less than four years ago, this Court decided that a three-judge district court was required in suits brought under 28 U. S. C. § 2281, even though the alleged "ground of the unconstitutionality" of the challenged statute was based upon a conflict between state and federal statutes. *Kesler* v. *Department of Public Safety,* 369 U. S. 153.

A state statute may violate the Equal Protection Clause of the Fourteenth Amendment or the Due Process Clause or some other express provision of the Constitution. If so a three-judge court is plainly required by 28 U. S. C. § 2281. But the issue of the "unconstitutionality" of a state statute can be raised as clearly by a conflict between it and an Act of Congress as by a conflict between it and a provision of the Constitution. The Supremacy Clause, contained in Art. VI, cl. 2 of the Constitution, states as much in clear language:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any

Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

An issue of the "unconstitutionality" of a state statute is therefore presented whether the conflict is between a provision of the Constitution and a state enactment or between the latter and an Act of Congress. What Senator Overman, author of the three-judge provision, said of it in 1910 is as relevant to enjoining a state law on the ground of federal pre-emption as it is to enjoining it because it violates the Fourteenth Amendment:

> "The point is, this amendment is for peace and good order in the State. Whenever one judge stands up in a State and enjoins the governor and the attorney-general, the people resent it, and public sentiment is stirred, as it was in my State, when there was almost a rebellion, whereas if three judges declare that a state statute is unconstitutional the people would rest easy under it. But let one little judge stand up against the whole State, and you find the people of the State rising up in rebellion. The whole purpose of the proposed statute is for peace and good order among the people of the States." 45 Cong. Rec. 7256.

Some of the most heated controversies between state and nation which this Court has supervised have involved questions whether there either was a conflict between a state statute and a federal one or whether a federal Act was so inclusive as to pre-empt state action in the particular area. One of the earliest and most tumultous was *Cohens* v. *Virginia*, 6 Wheat. 264, 440, where the alleged unconstitutionality of a Virginia law was based on the argument that an Act of Congress, authorizing a lottery in the District of Columbia, barred Virginia from making it a criminal offense to sell lottery tickets within that State. The protest from the States was vociferous[1] even though the Court in the end construed the federal Act to keep it from operating in Virginia. *Id.*, at 447. I therefore see no difference between a charge of "unconstitutionality" of a state statute whether the conflict be between it and the Constitution or between it and a federal law. Neither the language of the Supremacy Clause nor reason nor history makes any difference plain.

Pre-emption or conflict of a state law with a federal one is a recurring theme[2] arising in various contexts. The storm against *Cohens* v. *Virginia* was a protest against this Court acting as referee in a federal-state contest involving pre-emption or a conflict between the laws of the two regimes. Congress has recently been concerned with the problem in another aspect of the matter,[3] when efforts were made to curb the doctrine of preemption by establishing standards for an interpretation of an Act of Congress.[4] The three-judge court is only another facet of the self-same problem.

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[1] See Vol. 1, Warren, The Supreme Court in United States History (1926), p. 552 *et seq.*

"The *Richmond Enquirer* spoke of the opinion, 'so important in its consequences and so obnoxious in its doctrines,' and said that 'the very title of the case is enough to stir one's blood.' It feared that 'the Judiciary power, with a foot as noiseless as time and a spirit as greedy as the grave, is sweeping to their destruction the rights of the States . . . . These encroachments have increased, are increasing and ought to be diminished'; and it advocated a repeal of the fatal Section of the Judiciary Act as 'the most advisable and constitutional remedy for the evil.' A leading Ohio paper spoke of 'the alarming progress of the Supreme Court in subverting the Federalist principles of the Constitution and introducing on their ruins a mighty consolidated empire fitted for the sceptre of a great monarch'; and it continued: 'That the whole tenor of their decisions, when State-Rights have been involved, have had a direct tendency to reduce our governors to the condition of mere provincial satraps, and that a silent acquiescence in these decisions will bring us to this lamentable result, is to us as clear as mathematical demonstration.'" *Id.*, 552–553.

[2] Thus the dissent in *Cloverleaf Co.* v. *Patterson*, 315 U. S. 148, 179, called that decision in favor of pre-emption "purely destructive legislation." And see *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218; *Campbell* v. *Hussey*, 368 U. S. 297. Cf. *Hostetter* v. *Idlewild Liquor Corp.*, 377 U. S. 324.

The history of 28 U. S. C. § 2281, as related by the Court, speaks of the concern of Congress over the power of one judge to bring a halt to an entire state regulatory scheme. That can—and will hereafter—happen in all cases of pre-emption or conflict where the Supremacy Clause is thought to require state policy to give way. A fairly recent example is *Cloverleaf Co.* v. *Patterson,* 315 U. S. 148, where a federal court injunction in a pre-emption case suspended Alabama's program for control of renovated butter—a demonstrably important health measure. The Court in *Florida Lime Growers* v. *Jacobsen,* 362 U. S. 73, where one of the issues was pre-emption or conflict between two statutory systems, emphasized that the interest of the States in being free from such injunctive interference *at the instance of a single judge* outweighed the additional burdens that such a rule imposed on the federal court system. On reflection I think that result better reflects congressional policy even though, as in *Cohens* v. *Virginia,* the end result is only a matter of statutory construction.

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[3] H. R. 3, 88th Cong., 1st Sess., in material part provided:

"No Act of Congress shall be construed as indicating an intent on the part of Congress to occupy the field in which such Act operates, to the exclusion of all State laws on the same subject matter, unless such Act contains an express provision to that effect, or unless there is a direct and positive conflict between such Act and a State law so that the two cannot be reconciled or consistently stand together."

The first version of the bill was introduced in 1956. The House Committee on the Judiciary made numerous changes, limiting its application to the subject of subversion, and reported the bill out with a "do pass" recommendation. H. R. Rep. No. 2576, 84th Cong., 2d Sess. The Senate version, S. 3143, was not so narrowed in Committee. S. Rep. No. 2230, 84th Cong., 2d Sess. The bill was not passed in either the House or the Senate.

H. R. 3 was again introduced in the Eighty-fifth Congress. The Judiciary Committee again recommended that the bill "do pass," but this time did not narrow its scope to the subject of subversion. See H. R. Rep. No. 1878, 85th Cong., 2d Sess. It was passed by the House on July 17, 1958.

H. R. 3, having once again been approved by the Judiciary Committee, H. R. Rep. No. 422, 86th Cong., 1st Sess., was approved by the House on June 24, 1959.

In the Eighty-seventh Congress, H. R. 3 was favorably reported out by the Judiciary Committee. H. R. Rep. No. 1820, 87th Cong., 2d Sess., but was not acted upon by the full House.

[4] The concern of Congress in this chapter of federal-state relations did not concern the three-judge court problem but the broader aspects envisaged by such cases as *Pennsylvania* v. *Nelson*, 350 U. S. 497, *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, *Slochower* v. *Board*, 350 U. S. 551, *Railway Employees* v. *Hanson*, 351 U. S. 225, and *Cloverleaf Co.* v. *Patterson*, 315 U. S. 148. See H. R. Rep. No. 1820, 87th Cong., 2d Sess., p. 3 *et seq.*

On the basis of virtually no experience in applying that interpretation of the statute, a majority has now decided that the rule of *Kesler* is "unworkable" and, therefore, that our previous interpretation of the statute must have been incorrect. I regret that I am unable to join in that decision. My objection is not that the Court has not given *Kesler* "a more respectful burial," *Gideon* v. *Wainwright,* 372 U. S. 335, 349, but that the Court has engaged in unwarranted infanticide.

Stare decisis is no immutable principle.[6] There are many occasions when this Court has overturned a prior decision, especially in matters involving an interpretation of the Constitution or where the problem of statutory construction had constitutional overtones.

An error in interpreting a federal statute may be easily remedied. If this Court has failed to perceive the intention of Congress, or has interpreted a statute in such a manner is to thwart the legislative purpose, Congress may change it. The lessons of experience are not learned by judges alone.

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[6] See Radin, Case Law and Stare Decisis, 33 Col. L. Rev. 199 (1933).

I am unable to find a justification for overturning a decision of this Court interpreting this Act of Congress, announced only on March 26, 1962.

If the Court were able to show that our decision in *Kesler* had thrown the lower courts into chaos, a fair case for its demise might be made out. The Court calls the rule "unworkable." But it is not enough to attach that label. The Court broadly asserts that "lower courts have evidently sought to avoid dealing with its [*Kesler's*] application or have interpreted it with uncertainty." For this proposition, only three cases (in addition to the instant case) are cited. The Court's failure to provide more compelling documentation for its indictment of *Kesler* is not the result of less than meticulous scholarship, for so far as I have been able to discover, the truth of the matter is that there are no cases (not even the three cited) even remotely warranting the conclusion that *Kesler* is "unworkable."

Kesler was an attempt to harmonize our earlier cases. If the *Kesler* test is "unworkable" as the Court asserts, we should nonetheless accept its basic premise:

> "Neither the language of § 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of § 2281." 369 U. S., at 156.

If there is overruling to be done, we should overrule *Ex parte Buder*, 271 U. S. 461, and *Ex parte Bransford*, 310 U. S. 354.

That the ground of unconstitutionality in many so-called Supremacy Clause cases is found only in the asserted conflict between federal and state statutes is, as I have said, no basis for distinguishing that class of cases from others in which three-judge courts are plainly required. While courts are, strictly speaking, engaging in statutory construction in such cases, the task of adjudication is much the same as in what all would concede to be constitutional adjudication. Though the purpose of Congress is the final touchstone, the interests which must be taken into account in either case are much the same as *Cohens* v. *Virginia* eloquently demonstrates.

The Court has decided, on no more than the gloomy predictions contained in a handful of Law Review articles, that *Kesler* would inevitably produce chaos in the federal courts, that the rule announced there is "unworkable." Those predictions have plainly not been borne out. If difficulties arise, Congress can cure them. Until Congress acts, I would let *Kesler* stand.

I therefore believe that a three-judge court was properly convened and that we should decide this appeal on the merits.